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In the

Supreme Court of the United States

INDEPENDENT SCHOOL DISTRICT
NO. 12, CENTENNIAL,

Petitioner,

v.

MINNESOTA DEPARTMENT OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Minnesota Supreme Court misinterpreted regulations promulgated by the United States Department of Education pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, by requiring a school district to develop and include in a student's Individualized Education Plan accommodations for extracurricular and non-academic activities that are not required for the provision of a free appropriate public education and which would otherwise be provided by operation of Section 504 of the Rehabilitation Act of 1973?

STATEMENT OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Independent School District Number 12, Centennial Public Schools is a political subdivision of the State of Minnesota. Respondent Minnesota Department of Education is an executive agency of the State of Minnesota.

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PETITION FOR A WRIT OF CERTIORARI

Independent School District Number 12, Centennial Public Schools, ("District") respectfully petitions for a writ of certiorari to review the opinion and judgment of the Minnesota Supreme Court.

OPINIONS BELOW

The decision of the Minnesota Supreme Court (Appendix, *infra*, 1a-22a), is reported at 788 N.W.2d 907 (Minn. 2010). The decision of the Minnesota Court of Appeals (App., *infra*, 23a-46a), is reported at 767 N.W.2d 478 (Minn. App. 2009).

JURISDICTION

The judgment of the Minnesota Supreme Court sought to be reviewed was entered on October 7, 2010. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is being filed within 90 days of the entry of judgment. This Court has jurisdiction to review the judgment of the Minnesota Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED

The Minnesota Supreme Court's decision in this matter rests on its interpretation of three regulations promulgated pursuant by the United States Department of Education pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*. The specific Regulations, 34 C.F.R. §§ 300.107, 300.117, and 300.320 provide as follows:

The State must ensure the following:

(a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

34 C.F.R. § 300.107.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with

a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

34 C.F.R. § 300.117.

(a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324, and that must include-

(1) A statement of the child's present levels of academic achievement and functional performance, including-

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to-

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability;

(ii) For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives;

(3) A description of-

(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and

(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child-

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to

participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why-

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the

anticipated frequency, location, and duration of those services and modifications.

(b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include-

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessment related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

(c) Transfer of rights at age of majority. Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under §300.520.

(d) Construction. Nothing in this section shall be construed to require-

(1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

34 C.F.R. § 300.320.

STATEMENT OF THE CASE

I. BACKGROUND FACTS

Petitioner Independent School District Number 12, Centennial Public Schools ("District") is a public school district and political subdivision of the State of Minnesota. As such, the District is a local education agency ("LEA") that provides special education and related services to eligible students pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), and regulations promulgated by the United States Department of Education to implement the IDEA.[1] Petitioner also provides accommodations to students with disabilities as required by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § January 3, 2011 ("Section 504").

Respondent Minnesota Department of Education ("MDE") is an executive agency of the State of Minnesota. Pursuant to the IDEA, the MDE is the state education agency ("SEA") for the State of Minnesota. In its role as SEA, the MDE is responsible

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[1] Like other states, Minnesota has State statutes and rules pertaining to the provision of special education. *See* Minn. Stat. § 125A.01 *et seq.*; *see also* Minn. R. 3525.0200, *et seq.* These State statutes and rules are irrelevant to the issues raised in this Petition.

for ensuring school district compliance with the IDEA and the United States Department of Education ("DOE") regulations promulgated pursuant to the IDEA. *See, e.g.*, 34 C.F.R. § 300.17(b). However, the MDE has no authority to enforce compliance with Section 504. That authority is vested solely in the United States Department of Education's Office of Civil Rights ("OCR"). *See* 34 C.F.R. § 104.1, *et seq.*

This matter involves an eleven year old student who was determined eligible to receive special education and related services under the IDEA. Appendix 48a. Specifically, this matter involves accommodations for extracurricular activities that are, indisputably, not necessary to provide the student with a free appropriate public education ("FAPE").

On February 29, 2008, the student's special education team, including her parents, met to develop a new Individualized Education Plan ("IEP") for the student. App. 49a. At no time in this meeting did the parents, or any other members of the IEP team, assert that the student required participation in any extracurricular activity in order to progress on the goals and objectives in her IEP or to receive a FAPE. App. 59a-60a.

Notwithstanding the team meeting and the fact that the parents did not then identify any particular extracurricular activity in which they intended to enroll the student, the parents subsequently informed the District that they were concerned by the fact that the IEP did not include a statement of accommodations that the parents wished the student to receive in any extracurricular activities in which she might potentially enroll. App. 59a.

The IEP team responded to the parents' concerns by stating that a "504 plan" developed by the student's "504 team" would address any such accommodations.[2] App. 59a-60a. The team's response was founded on its conclusion, in which the Parents shared, that participation in extracurricular activities was not necessary to provide the student a FAPE and the belief of the school members on the team that the IEP team was only responsible and empowered to develop and implement educational programming and such supplementary services that relate to the provision of a FAPE, or, as the Minnesota Court of Appeals termed it, activities with a nexus to the student's special education needs. *See id.* (IEP Team), App. 38a-40a (Minnesota Court of Appeals).

II. THE MINNESOTA DEPARTMENT OF EDUCATION'S COMPLAINT DECISION AND SUBSEQUENT LITIGATION

The IDEA permits parents to challenge the sufficiency of services being provided to their children in two different ways: (1) requesting a due process hearing conducted by an independent hearing officer; or (2) filing a complaint with the relevant SEA. *See, e.g.*, 34 C.F.R. § 300.151, 20 U.S.C. § 1415(k). Pursuant to that provision, on May 18, 2008, the parents initiated a complaint with the MDE alleging that the District had violated the IDEA. *See, generally,* App. 47a, *et seq.*

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[2] The term "504 plan" refers to a plan of accommodations developed by District employees pursuant to Section 504 of the Rehabilitation Act of 1973. The term "504 team" refers to the group of employees responsible for developing the "504 plan."

The parents' complaint did not challenge the adequacy of the goals, objectives, or educational services set forth in the student's IEP. App. 47a-48a. Nor did the parents' complaint allege that the District had denied the student FAPE. *Id.* Instead, the parents challenged the absence of a statement in the IEP describing the supplementary aids and services and program modifications or supports necessary to enable the student to participate in extracurricular and nonacademic activities. *Id.* Nowhere in their complaint did the parents assert that participation in any extracurricular activity was necessary to ensure the provision of a FAPE.

The MDE issued its complaint decision on July 15, 2008. App. 47a. Relevant to this Petition, the MDE concluded that

> The District violated 34 C.F.R. § 300.320 when it failed to adequately document the projected start date, anticipated frequency, location, and duration of all of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel necessary to enable the Student to advance appropriately towards attaining her annual goals, to be involved in and make progress in the general curriculum, and to participate in extracurricular and other nonacademic activities.

App. 87a.[3] MDE further found that

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[3] In its complaint decision, the MDE also determined that that the District violated the IDEA by failing to provide accommodations

> When a child with a disability requires supplementary aids and services in order to participate in or benefit from extracurricular or other nonacademic activities, the IEP team must document those supplementary aids and services in the IEP. *The use of a Section 504 plan in the case of a child with a disability deprives the parents the specific due process rights provided by the IDEA*, such as the right to a team meeting with the regular and special education teachers and a qualified representative of the District; written notice of proposals and refusals; documentation in the IEP; and the dispute resolution measures of conciliation, resolution sessions and a due process hearing before a knowledgeable and impartial hearing officer."

App. 75a (emphasis supplied). The MDE directed the District to undertake "corrective action" related to the perceived IDEA violations. In relevant part, the MDE directed the District to, by July 31, 2008:

> [C]onvene the Student's IEP team, with at least the minimally required team members, to discuss the supplementary aids and services the Student may need in the extracurricular and other nonacademic *activities the Complainants have selected for her* by the fall of 2008. Any such services must be properly documented in the IEP, including a statement of the needed

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at an activity sponsored by a parent-teacher organization. App. 87a. This conclusion, which was rejected by the lower courts, does not form any basis of the District's Petition.

> service and the projected date for the beginning of the services, and the anticipated frequency, location, and duration of those services.

App. 88a. Moreover, the MDE directed the District that:

> District special education staff and parents must be informed of the District policy and legal requirements that when a child has an [IEP], the IEP team must document the supplementary aids and services to enable the child to participate in extracurricular and other nonacademic activities, *and that a separate Section 504 plan* should not be created to address IEP content.

App. 88a-89a (emphasis supplied).

On September 5, 2008, the School District wrote the MDE asking it specific questions relevant to its corrective action order. App. 94a. On September 12, 2008, the MDE responded to this request, in relevant part, by clarifying its complaint decision as follows:

> Extracurricular activities need not be documented in the IEP unless the IEP team determines a particular activity or activities are necessary to provide a free appropriate public education to a child. When a child with a disability participates in an extracurricular activity, the IEP need only document how, as necessary, that activity will be made accessible to the child, consistent with 34 C.F.R. § 300.42 and 300.107. *It is not for the team to determine whether a child can participate in a particular*

> *activity, only how to make that activity accessible.* If the team requires additional expertise to make such determinations, it is required to bring in people who can assist in accordance with 34 C.F.R. § 300.321(a)(6).

App. 96a (emphasis supplied).

As permitted under Minnesota law, the District petitioned the Minnesota Court of Appeals for certiorari review of the MDE's complaint decision. App. 23a-46a. As the court stated in its decision, the "primary issue [on appeal was] whether MDE erred in interpreting IDEA and its implementing regulations to require school districts to include in IEPs the supplementary aids and services (accommodations) needed for a child to participate in extracurricular and nonacademic activities identified for that child by her parents." App. 33a. The court "reverse[d] MDE's determination that the parents' request for accommodations for an extracurricular activity alone necessitates inclusion of accommodations for the activity in the child's IEP and its determination that such accommodations are required regardless of a nexus between the activity and an appropriate education for the child." App. 46a.

MDE petitioned the Minnesota Supreme Court for further review. *See* App. 1a. In its decision dated October 7, 2010, the Minnesota Supreme Court reversed the court of appeals, holding that "the plain language of IDEA regulations 34 C.F.R. §§ 300.320(a)(4)(ii), 300.107, and 300.117 establishes that extracurricular and nonacademic activities that may be included in an IEP are not limited to those activities required to educate the disabled child." App.

19a. The court further concluded that "[r]equring disabled students to prove an educational benefit, when nondisabled students need not, does not afford disabled students an equal opportunity to participate in extracurricular and nonacademic activities." App. 17a. For the reasons discussed herein, the District now petitions this Court for certiorari review of the Minnesota Supreme Court's decision.

REASONS FOR GRANTING THE PETITION

This is not a case about whether a school district must offer students with disabilities the opportunity to participate in extracurricular activities. Nor is it a case about the sufficiency of any such opportunity that was offered to the student. Instead, this is a case about how a school district must provide students with disabilities the opportunity to participate in extracurricular activities that are not required for the student to receive a FAPE.

The only issue before this Court is whether a student's IEP must address the student's participation in extracurricular and nonacademic activities that are not related to, or necessary for, the student's receipt of a FAPE; or, alternatively, whether such nonacademic activities are appropriately addressed through Section 504. The Minnesota Supreme Court's decision demonstrates a basic and fundamental misunderstanding about the relationship between Section 504 and the IDEA. This misunderstanding has a deleterious effect on the rights of IDEA eligible students with disabilities, and places undue extraneous administrative and financial burdens on the nation's school districts.

The District respectfully submits that there are three reasons why this Court should grant its petition for writ of certiorari. First, the Minnesota Supreme Court's decision that a student's IEP must determine accommodations to allow the student to participate in extracurricular and non-academic activities which are not related to the student's receipt of a FAPE is in direct conflict with multiple decisions of the United States Courts of Appeals that define the role of a student's IEP team, and that recognize the distinction between the IDEA and Section 504. Second, the Minnesota Supreme Court's decision conflicts with multiple decisions of this Court regarding the scope of the IDEA. Finally, further review of this decision is necessary to prevent the erosion of students' rights under Section 504 and the imposition of serious administrative and financial costs on school districts, not only in Minnesota, but nationwide.

I. THE MINNESOTA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS

The Minnesota Supreme Court's conclusion that a student's IEP must include the supplementary aids and services necessary to permit the student to participate in non-academic and/or extracurricular activities that are not related to the provision of FAPE is in direct conflict with numerous decisions of the United States Courts of Appeals which have recognized the limited role of a student's IEP team. The Minnesota Supreme Court's decision also conflicts with a previous decision of the Sixth Circuit that held that an IEP need not provide for access to extracurricular activities that do not provide

educational benefit. This Court's review is necessary to resolve these conflicts.

In this case, the Minnesota Supreme Court interpreted 34 C.F.R. § 300.107 and concluded that its "plain language" necessitates that IEPs address extracurricular activities that do not relate to FAPE. App. 19a. The lower court's interpretation of Regulation 300.107 is in direct conflict with the Sixth Circuit Court of Appeals' interpretation of the IDEA regulations. *See Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 332 (6th Cir. 1986). In its *Rettig* decision, the Sixth Circuit held that the IDEA and its implementing regulations do not require a school district to provide access to extracurricular activities if those activities do not assist the student to "benefit from special education;" that is to say, those activities that do not relate to FAPE. 788 F.2d at 332. In reaching this conclusion, the Sixth Circuit specifically recognized that 34 C.F.R. § 300.306 was in conflict with this Court's interpretation of the scope of the IDEA.[4] 788 F.2d at 332 (citing *Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).[5] Because of this conflict between Regulation 300.306 and the *Rowley* decision, the *Rettig* court rejected the claim that Regulation 300.306 entitled the student to participate in extracurricular activities that did not relate to FAPE. *Id.*

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[4] Regulation 300.306 is the direct predecessor, and contains language that is substantially similar, to 34 C.F.R. § 300.107.

[5] The *Rowley* and *Rettig* decisions discuss the "Education for All Handicapped Children Act" or "EHCA." The EHCA was renamed the IDEA in 1990. Pub. L. No. 101-476, 104 Stat. 1103 (Oct. 30, 1990).

Indeed, since it was issued, federal courts have consistently relied on the *Rettig* decision to conclude that the IDEA does not require IEPs to provide access to extracurricular activities if those activities are not necessary for a student to receive FAPE. *See, e.g., Rosinsky v. Green Bay Area Sch. Dist.*, 667 F. Supp. 2d 964, 986 (E.D. Wis. 2009) (citing *Rettig* for the proposition that an IEP need only include extracurricular activities if the student will receive educational benefit); *see also Lessard v. Wilton-Lyndenborough Coop. Sch. Dist.*, 518 F.3d 18, 30 (1st Cir. 2008) (citing *Rettig*), *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, No. 3-89-0803, 1991 WL 433723 (M.D. Tenn. Apr. 22, 1991) (unpublished) (rejecting the proposition that an IEP needed to include participation on a football team where such participation was not necessary to provide a FAPE). The Minnesota Supreme Court's conclusion that the "plain language" of 34 C.F.R. § 300.107, the successor to 34 C.F.R. § 300.306, requires IEPs to include extracurricular activities that are not related to FAPE is in direct conflict with the Sixth Circuit's *Rettig* decision and the subsequent federal decisions applying *Rettig*. This Court's review is necessary to reconcile this conflict as to the requirements of the IDEA.

Moreover, the Minnesota Supreme Court's interpretation of the IDEA regulations conflicts with multiple Circuit Courts of Appeals' decisions regarding the scope of the IDEA and the role of the IEP team. The Courts of Appeals have repeatedly interpreted the IDEA as regulating only "educational" programs of school districts. For instance, the Seventh Circuit has held that the IDEA pertains only "to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of

a [FAPE] to such child." *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 (7th Cir. 2007) (internal citations and quotation marks omitted); *Lessard*, 518 F.3d at 26 (identifying the IEP team as responsible for providing FAPE).

In a recent decision, the Fourth Circuit succinctly described the statutorily mandated role of a student's IEP team and the purpose of an IEP. *See Shaw v. Weast*, 364 F.Appx. 47, ** 1 (4th Cir. 2010) (unpublished). Specifically, the *Weast* court recognized that:

> IDEA requires that an IEP Team, consisting of the student's parents, students teacher, a school district representative, and, where appropriate, the student, develop an [IEP] for the student, *setting forth the details on the implementation of the student's FAPE.* The IEP contains statements about the child's functioning levels, goals, services to be provided, and criteria for future evaluations of the child's progress.

Id. (internal citations and quotation marks omitted) (emphasis added).

Similarly, the Ninth Circuit recognized that "[a]n IEP is the product of an extensive process and represents the reasoned conclusion of the IEP Team that the specific measures it requires are necessary for the student to receive a [FAPE]." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 508 F.3d 811, 827 (9th Cir. 2007); *see also Bd. of Educ. of Fayette Cnty., Ky. V. L.M.*, 478 F.3d 307, 314-15 (6th Cir. 2007) (holding that school districts are only required to provide extended school year services if the student's

IEP team determines that such services are necessary to ensure the provision of FAPE), *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 529 n.9 (4th Cir. 2002) (same).

The Minnesota Supreme Court's ruling that the IDEA regulations require a student's IEP to describe accommodations necessary to allow a student to participate in non-FAPE related activities directly conflicts with these decisions of the United States Courts of Appeals. This Court should accept review of this case to resolve this conflict.

II. CONTRARY TO CONGRESSIONAL INTENT AND NUMEROUS DECISIONS OF THE UNITED STATES COURTS OF APPEALS, THE MINNESOTA SUPREME COURT HAS OBVIATED THE DISTINCTION BETWEEN SECTION 504 AND THE IDEA

In this case, the Minnesota Supreme Court held that an IEP must include in each student's IEP supplementary aids and services related to extracurricular activities that are not necessary for a student to receive FAPE, in part, because "[r]equring disabled students to prove an educational benefit, when nondisabled students need not, does not afford disabled students an equal opportunity to participate in extracurricular and nonacademic activities." App. 17a. The court's decision conflates a school district's educational responsibilities under the IDEA with the anti-discrimination mandate of Section 504. In this way, the court's decision conflicts directly with the purpose of the IDEA and the numerous Circuit Courts of Appeals that have recognized that an important distinction exists between the two statutes.

"The express purpose of the [IDEA] is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2494 (2009) (citing 20 U.S.C. § 1400(d)(1)(A) internal quotation marks omitted). As the *Forest Grove* decision and the text of Section 1400(d)(1) make clear, the IDEA regulates specially designed instruction provided to students with disabilities. *See also* 20 U.S.C. § 1401(24) (defining "special education") and 34 C.F.R. § 300.39 (same).

In contrast to the educational requirements of the IDEA, Section 504 "prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap." *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 275 (1987); *see also* 34 C.F.R. § 104.01 (identifying the purpose of Section 504). The "central purpose" of Section 504 "is to assure that handicapped individuals receive evenhanded treatment in relation to nonhandicapped individuals." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (internal citations and quotation marks omitted).

The United States Courts of Appeals have recognized the numerous significant differences between Section 504 and the IDEA. As the Fifth Circuit has held,

> [T]he goal of the IDEA is to require a FAPE that will permit the child to benefit from the educational experience. It need not be the best possible education nor one that will maximize

> the child's educational potential. Admittedly different from those underlying the IDEA, the Congressional objective of both the [Americans with Disabilities Act] and § 504 is the elimination of discrimination against individuals with disabilities.

Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 291 (5th Cir. 2005) (internal citations and quotation marks omitted).

Other Circuit Courts of Appeals have also recognized this important distinction between Section 504 and the IDEA. The Tenth Circuit, for example, has held that "Section 504 has a broader scope than the IDEA: while the IDEA focuses on the provision of *appropriate public education* to disabled children, Section 504 addresses the provision of state services to disabled individuals generally." *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815, 823 (10th Cir. 2009) (citing *Mark H. v. Lemahieu*, 513 F.3d 922, 929 (9th Cir. 2008) (emphasis supplied); *see also Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp. 2d 401, 405-07 (D.R.I. 2003)); *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 729 (3d Cir. 2009) (identifying that the IDEA requires the provision of FAPE through "designing an implementing an [IEP], which must be reasonably calculated to enable the child to receive meaningful educational benefits" while section 504 prohibits discrimination); *Sellers by Sellers v. Sch. Bd. of City of Mannassas, Va.*, 141 F.3d 524, 528 (4th Cir. 1998) (recognizing that IDEA requires the provision of FAPE while Section 504 prohibits disability based discrimination).

The Minnesota Supreme Court's decision in this matter completely misses the difference between the IDEA's educational purpose and the nondiscrimination requirements of Section 504.[6] The court's failure to separate the District's obligations under Section 504 from its IDEA-imposed educational responsibilities thus conflicts with the Circuit Court of Appeals' cases which have recognized this distinction. Review by this Court is necessary to resolve that conflict.

Perhaps contributing to the Minnesota Supreme Court's confusion is the fact that DOE Regulations promulgated to enforce Section 504 also mandate the provision of a "free appropriate public education." *See* 34 C.F.R. § 104.33. However; the FAPE required by Section 504 is markedly different than the FAPE required by the IDEA. In its *Lemahieu* decision, the Ninth Circuit recognized that the "most important differences [between IDEA and Section 504] are that, unlike FAPE under the IDEA, FAPE under § 504 is defined to require a comparison between the manner in which the needs of disabled and nondisabled children are met..." 513 F.3d at 933.

By comparing the ability of students with disabilities to access extracurricular activities with nondisabled students' access to such activities, the Minnesota Supreme Court imported the "FAPE" requirement of Section 504 into the IDEA. Thus, its decision in this case conflicts with the explicit

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[6] Moreover, this aspect of the decision is factually unsound. The District offered to provide all necessary accommodations at extracurricular activities through the use of a "504 plan." App. 59a-60a. No proof of educational benefit is necessary to receive accommodations under Section 504.

distinction between the two statutes, as recognized by the United States Courts of Appeal for the Sixth, Fourth, Third, and Ninth Circuits. Review of the Minnesota Supreme Court's decision in this case will address this conflict, and provide a clear set of guidelines for school districts to follow when providing accommodations related to extracurricular and other nonacademic activities not required to an IDEA eligible special education student to receive FAPE under the IDEA.

III. THE MINNESOTA SUPREME COURT'S DECISION CONFLICTS WITH MULTIPLE DECISIONS OF THIS COURT

The Minnesota Supreme Court's interpretation of the IDEA regulations at issue is directly at odds with this Court's past interpretation of the obligations the IDEA imposes on school districts. The court also departed radically from this Court's jurisprudence under the Spending Clause of the United States Constitution. Finally, the Minnesota Supreme Court has, contrary to this Court's past decisions and the express purpose of the IDEA, extended the IDEA's "due process" protections to non-FAPE, non-educational school activities. This Court should accept review of the Minnesota Supreme Court's decision to provide the lower courts with explicit guidance on these important areas of law.

A. The Minnesota Supreme Court's Decision Ignores the Scope of the IDEA as explained in this Court's *Rowley* Decision

Throughout these proceedings, the MDE has argued that, in addition to the provision of FAPE, the

IDEA requires school districts to provide "an equal opportunity" for students with disabilities to participate in extracurricular and non-academic activities. *See, e.g.*, Respondent's Brief to Minnesota Supreme Court at 13. The Minnesota Supreme Court adopted this contention. *See, e.g.*, App. 17a (citing 34 C.F.R. § 300.107). However, this Court has previously confirmed that the "opportunity" provided by the IDEA is limited to the provision of a free appropriate public education. *Rowley*, 458 U.S. at 198. Thus, the Minnesota Supreme Court's interpretation of the IDEA regulations conflicts directly with a previous decision of this Court. The Court's review of this decision is necessary to correct the lower court's deviation from binding Supreme Court precedent.

In *Rowley*, the Respondents argued that "the goal of the [IDEA] is to provide each handicapped child with an equal educational opportunity." *Id.* (internal quotation marks and citation omitted). The Court rejected that argument, in part, because the "educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." *Id.* The Court then noted that requiring the provision of "equal educational opportunities" is an "entirely unworkable standard requiring impossible measurements and comparisons." *Id.* The Court concluded its rejection of the Respondents "equal educational opportunity" argument by stating that the "theme of the [IDEA] is [FAPE], a phrase which is too complex to be captured by the word "equal," *whether one is speaking of opportunities or services.*" *Id.* (quotation marks in original, emphasis supplied).

The Minnesota Supreme Court's decision in this case completely ignores the *Rowley* Court's conclusion that the obligations created by the IDEA are limited to the provision of FAPE. By concluding that the IDEA requires school districts to provide services to allow students with disabilities to participate in extracurricular activities that do not factor in to their receipt of a FAPE, the Minnesota Supreme Court has resurrected the very argument that this Court rejected in *Rowley*; namely, that the IDEA requires school districts to provide "equal" opportunities to students with disabilities.[7] Further review is necessary to correct the Minnesota Supreme Court's glaring deviation from this Court's precedent.

B. The Minnesota Supreme Court's Decision Conflicts with the Important Limitations that this Court has Applied to Legislation Enacted Under the Spending Clause of the United States Constitution

The Minnesota Supreme Court's conclusion that the IDEA requires school districts to include accommodations for student participation in non-FAPE related extracurricular activities in a student's IEP interprets the IDEA regulations in such a manner as to impose burdens on school districts that are not clearly required by the text of the IDEA itself. The Minnesota Supreme Court's expansion of the IDEA's requirements, through interpretation of its

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[7] As discussed above, Section 504 and its implementing regulations require school districts to provide such services. There is no dispute that the District is willing to provide the necessary accommodations through the framework of Section 504.

regulations, rather than its text, ignores this Court's past decisions regarding the allowable scope of statutes enacted pursuant to the Spending Clause of the United States Constitution.[8]

As this Court has recognized, "Congress enacted the IDEA pursuant to the Spending Clause." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 295 (2006) (citing U.S. Const., Art. I § 8, cl. 1 and *Schaffer v. Weast*, 546 U.S. 49 (2005)). When Congress exercises its power under the Spending Clause and "attaches conditions to a State's acceptance of federal funds, the conditions must be set out *unambiguously*." *Id.* at 296 (internal citations and quotation marks omitted, emphasis supplied). Such conditions must be viewed in "much the same nature as a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly." *Id.* (Internal citation and quotation marks omitted.) Recipients of federal funds "cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Id.* (Internal citation omitted).

This Court has previously held that the IDEA imposes only one "clear obligation" on recipient States: "the requirement that handicapped children receive some form of *specialized education*." *Rowley*, 458 U.S. at 195 (emphasis supplied). Thus, applying this Court's Spending Clause jurisprudence, the IDEA

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[8] While the Minnesota Court of Appeals correctly recognized the limitations on the IDEA as Spending Clause legislation, *see* App. 32a, the Minnesota Supreme Court's decision is devoid of any reference to the Spending Clause.

cannot be interpreted as imposing any conditions that do not relate to "specialized education."

By interpreting the IDEA's regulations as requiring school districts to include "supplementary aids and services" necessary for a student to participate in extracurricular activities that are not required for the student's receipt of a "free appropriate public education," the Minnesota Supreme Court has expanded the scope of the IDEA's conditions on States' receipt of federal funding far beyond "specialized education."[9] In other words, the court's interpretation of the IDEA's implementing regulations adds a new condition on Minnesota's receipt of federal funds, one that is decidedly not "unambiguous." Review of the court's decision is necessary to clarify that the IDEA's conditions on the States' receipt of federal funds are limited to "educational" conditions; specifically, the provision of a FAPE to students with disabilities.

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[9] While the Minnesota Supreme Court's decision rests on the IDEA's implementing regulations, it is axiomatic that a "regulation cannot change the statute" under which it was enacted. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000); *see also U.S. v. O'Hagan*, 521 U.S. 642, 652 (holding that liability created by agency regulation must be limited to liability imposed by authorizing statute); *see also* 20 U.S.C. §§ 1406(b)(1), 1406(d) (limiting the rulemaking authority of the DOE). Therefore, any interpretation of the IDEA's regulations must be limited by the scope of the IDEA itself.

C. Contrary to this Court's Jurisprudence, and the Text of the IDEA itself, the Minnesota Supreme Court's Decision Provides IDEA "Due Process" Rights to Extracurricular Activities

The Minnesota Supreme Court's decision affords IDEA "due process" protection to a student's involvement in extracurricular activities that are not necessary for the provision of FAPE. The court's decision thus expands the scope of the IDEA's remedial provisions to activities that are not included within the ambit of the IDEA. Further review of the lower court's interpretation of the IDEA and it implementing regulations is necessary to correct this inappropriate judicial expansion of the IDEA's procedural safeguards.

As this Court has stated, "[w]hen a party objects to the adequacy of the education provided, the construction of the IEP, or some related matter, the IDEA provides procedural recourse." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525 (2007). Specifically, the IDEA provides parties the opportunity to submit a complaint with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* (quoting 20 U.S.C. § 1415(f)(1)(B)(ii)). Conspicuously absent from this list, the IDEA does not permit a party to issue a complaint with respect to any matter not related to FAPE or a school district's obligation to educate students with disabilities.

In this case, the MDE concluded that the student was entitled to access IDEA's due process procedures

with respect to school district decisions related to activities which do not confer educational benefit on the student, and which are, indisputably, not related to the student's receipt of a FAPE. App. 75a. In reversing the court of appeals, the Minnesota Supreme Court endorsed this interpretation of the IDEA. In so doing, the court expanded the scope of activities subject to the IDEA's procedural safeguards to include non-FAPE related extracurricular activities. The court's decision ignores the IDEA's explicit limitations as to the availability of procedural remedies, limitations which this Court has previously recognized. *See Winleman, supra.* This Court's review of the Minnesota Supreme Court's interpretation of the IDEA is necessary to clarify the scope of the IDEA's procedural remedies and to correct the lower court's inexplicable deviation from those statutory limits.

IV. SUPREME COURT REVIEW IS NECESSARY TO PREVENT NATIONWIDE HARM TO STUDENTS AND SCHOOL DISTRICTS ALIKE

The Minnesota Supreme Court's decision in this regard has nationwide import. The court's interpretation of the IDEA regulations impairs the rights of IDEA eligible students with disabilities under Section 504, places considerable administrative burden on school districts, encourages "forum shopping," and partially usurps, for the benefit of State Education Agencies, the authority of the OCR to enforce Section 504. This Court's review of the lower court's decision is necessary to stave off these detrimental effects.

The IDEA requires parents and students who are aggrieved by a school district's provision of special

education and related services to exhaust an administrative process, culminating with a "due process hearing" before obtaining relief. *See* 20 U.S.C. § 1415(f). Parties are then entitled to appeal a due process hearing decision to a State court or a United States district court. 20 U.S.C. § 1415(i)(2)(A). While the IDEA provides for injunctive relief and other remedies to ameliorate the loss of educational opportunity, it does not allow parties to recover money damages. *See, e.g., Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996).

Section 504, on the other hand, permits aggrieved parties to recover money damages against school districts that discriminate against students on the basis of disabilities. *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 188-190 (2002) (recognizing that money damages are available in a suit brought under Section 504, but rejecting claim for punitive damages); *see also Lane v. Pena*, 518 U.S. 187, 191-92 (1996) (concluding that Congress had not waived sovereign immunity with respect to claims brought under Section 504). Typically, plaintiffs are not required to follow any administrative procedure before initiating a lawsuit under Section 504.

When a potential litigant's claim under Section 504 seeks relief that could also be provided under the IDEA, the IDEA's exhaustion requirements apply, preventing that party from proceeding directly to court. 20 U.S.C. § 1415(l); *see also C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 632 n.7 (8th Cir. 2010). The IDEA exhaustion requirements are applicable to claims for money damages, despite the fact that the IDEA does not provide for money damages when the complaint

alleges violations of Section 504 that would also violate the IDEA. *See, e.g., Gave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246 (2d Cir. 2008) (holding that plaintiffs may not sidestep the exhaustion requirement of the IDEA" simply by requesting money damages); *see also M.T.V. v. DeKalb Cnty. Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006) (holding that students must utilize the IDEA administrative procedures to obtain relief even if they invoke another statute as the grounds for relief) (internal citations omitted).

By requiring a student's IEP to include the supplementary aids and services necessary to allow a student with a disability to participate in non-FAPE related extracurricular activities, the Minnesota Supreme Court has expanded the scope of the IDEA's exhaustion requirements to include accommodations provided in such activities; accommodations that were previously required solely by Section 504. No more will IDEA eligible students with disabilities who have been unable to participate on, for example, a school's football team because they have been denied reasonable accommodations under Section 504 be able to bring an immediate suit for the school district's violation of Section 504. *See, e.g., Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (D.C. Pa. 1982) (involving a claim for injunctive relief under Section 504 related to a student's participation on the school football team). Instead, those students will have to first exhaust the administrative process required by the IDEA.

In addition to depriving students of their right to initiate claims for money damages for certain violations of Section 504, the Minnesota Supreme

Court's decision in this matter shortens the time period in which those claims may be pursued. The IDEA expressly requires parties to initiate administrative proceedings within two years of the alleged violation. 20 U.S.C. § 1415(b)(6)(B). Section 504, on the other hand, contains no express statute of limitations. In Minnesota, the statute of limitations for claims arising out of Section 504 is six years. *See Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 (8th Cir. 2003) (internal citation omitted) (applying Minnesota's six-year statute of limitations to claims brought under Section 504). Thus, the Minnesota Supreme Court's ruling in this case has greatly reduced the time period in which students with disabilities must commence actions with respect to accommodations (or supplementary aids and services) necessary to allow them to participate in extracurricular activities. Review of this decision is necessary to remedy this deleterious effect on the rights guaranteed by Section 504 to IDEA eligible students with disabilities.

This Court's review will also redress the Minnesota Supreme Court's expansion of MDE's enforcement authority, an expansion which infringes upon the jurisdiction of the OCR. The OCR is responsible for enforcing school districts' obligations under Section 504. *See* 34 C.F.R. § 104.6. On the other hand, Congress delegated to State agencies, such the MDE, authority to ensure school district's compliance with the IDEA. *See* 20 U.S.C. § 1415(b)(6) and (7). By bringing non-FAPE related extracurricular activities within the ambit of the IDEA, the Minnesota Supreme Court's decision in this matter has granted the MDE jurisdiction over claims related to such extracurricular activities. As accommodations to allow students with

disabilities to participate in extracurricular activities are typically subject to Section 504, *see, e.g., Grube, supra*, this expansion of the MDE's jurisdiction detracts from OCR's authority to enforce Section 504. This Court's review is necessary to prevent this judicial redistribution of enforcement authority.

Finally, the Minnesota Supreme Court's decision in this matter places additional administrative and financial burdens on school districts. Review of this decision is necessary to relieve school districts of these burdens, which were never contemplated by the IDEA itself.

Pursuant to the IDEA, IEP teams must meet at least annually to discuss and modify a student's IEP. IEP teams must also meet to discuss any change in services, educational programming, or accommodations. 20 U.S.C. § 1414(d)(4). IEP teams are composed of a student's educators, parents, and other persons with knowledge of the student. 20 U.S.C. § 1414(d)(1)(B). The IDEA requires that a team participate at an IEP meeting. 20 U.S.C. § 1414(d). The IDEA also requires all changes to an IEP be made at an IEP meeting. *Id.* Therefore, each IEP meeting requires district employees to take time from their other duties, including classroom instruction, to prepare for and attend the meeting. Because an IEP meeting is often scheduled at the convenience of the parents, it is possible that a district may have to pay a substitute teacher for time that each instructional employee spends attending an IEP meeting.

The Minnesota Supreme Court's interpretation of the IDEA and its implementing regulations requires IEP teams to meet to consider accommodations for

each and every extracu . icular or nonacademic activity regardless of whether such activity is required to provide the student with a FAPE. The additional obligation would substantially add to an IEP team's tasks.

Students have the opportunity to participate in numerous extracurricular and nonacademic activities each year. Typically, schools offer such activities on a quarterly or semester basis. Some, however, are offered on an impromptu or ad hoc basis. For many extracurricular activities, such as sports teams, there are additional post-season banquets or awards celebrations for which further accommodations may be necessary. Multiplying the number of students receiving services under an IEP and the vast possibility of extracurricular and nonacademic activities in which students and their parents may express an interest in, it is clear that the Minnesota Supreme Court's decision creates a substantial and daunting number of additional IEP meetings being held in school districts throughout Minnesota and, if other states follow Minnesota's lead, the Nation as a whole.

As this Court has recognized, the "theme" of the IDEA is FAPE. *Rowley*, 458 U.S. 198. The Minnesota Supreme Court's decision in this matter has imposed additional financial and administrative burdens on school districts; burdens that do not relate to the provision of FAPE. Therefore, this Court's review is necessary to correct the imposition of these additional burdens.

The Minnesota Supreme Court's decision in this matter restricts the rights of students with disabilities, and their parents, that are guaranteed by Section 504.

The court's decision is deleterious of OCR's jurisdiction over Section 504, and imposes additional administrative and financial burdens on school districts. Review of this decision is necessary to correct these harms.

CONCLUSION

For the foregoing reasons, Petitioner Independent School District Number 12, Centennial Public Schools, requests that the Court grant its Petition for a Writ of Certiorari and accept review of the Minnesota Supreme Court's decision.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

A08-1600

[Filed October 7, 2010]
Office of Appellate Courts

Court of Appeals — Meyer, J.
Concurring in part, dissenting in part, Anderson, G. Barry, J.
Took no part, Page and Stras, JJ.

Independent School District No. 12, Centennial,

Respondent,

vs.

Minnesota Department of Education,

Appellant.

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SYLLABUS

Federal regulations 34 C.F.R. §§ 300.107, 300.117, and 300.320(a)(4)(ii) (2010), promulgated under the Individuals with Disabilities Education Act do not limit extracurricular and nonacademic activities included in an Individual Education Program (IEP) to extracurricular and nonacademic activities required to educate a disabled student.

A disabled student's IEP team determines the extracurricular and nonacademic activities appropriate for inclusion in a disabled student's IEP.

A disabled student's IEP team determines which supplementary aids and services are appropriate and necessary for the student to participate in extracurricular and nonacademic activities.

Affirmed in part and reversed in part.

OPINION

MEYER, Justice.

This case addresses the scope and operation of a school district's obligation under the federal Individuals with Disabilities Education Act (IDEA) to provide disabled students an equal opportunity to participate in extracurricular and nonacademic activities. Here, the parents of a disabled student in Independent School District No.12, Centennial (the School District), respondent, requested that the student's Individual Education Program (IEP) team consider supplementary aids and services to enable the student to participate in extracurricular and nonacademic activities. The School District refused to consider the requested supplementary aids and services at the student's IEP team meetings. The parents filed a complaint with the Minnesota Department of Education (the Department), appellant. In its complaint decision, the Department concluded that the School District violated IDEA by refusing to consider the requested supplementary aids and services for inclusion in the student's IEP. The School District appealed.

The court of appeals held that IDEA requires that an IEP team consider whether an extracurricular and nonacademic activity is appropriate for a disabled student and, if so, provide supplementary aids and services necessary for participation. *Indep. Sch. Dist. No. 12, Centennial v. Minn. Dep't of Educ.*, 767 N.W.2d 478, 486 (Minn. App. 2009). But the court further held that an IEP need only consider extracurricular and nonacademic activities "required for the education of the [disabled student]." *Id.* The Department petitioned

our court for review. We granted review to determine whether the IDEA regulations limit the extra-curricular and nonacademic activities included in an IEP to only those "required for the education" of disabled students. We hold that the IDEA regulations contain no such limit.

This case involves a fifth-grade student diagnosed with autism spectrum disorder. As part of her condition, the student experiences tics when feeling anxiety that prevents the student from working. The condition also creates "strong sensory needs" in the student, who must occasionally have "motor breaks" to "move about in the classroom." The student has also been recently diagnosed with Tourette Syndrome and frequently struggles with motor, vocal, and facial tics, especially when anxious.

Because the student met the state eligibility criteria, the student was determined eligible for, and in need of, special education and related services. Like all public school children who receive special education and related services, the student's educational needs are met through development of an IEP. An IEP is a personalized plan detailing a disabled student's unique educational needs and identifying necessary accommodations. *See generally* 20 U.S.C. § 1414(d) (2006). A team consisting of the student's teachers, parents, school administrators, related service personnel, and, when appropriate, the student creates the IEP. 20 U.S.C. § 1414(d)(1)(B). The IEP must be reviewed at least annually but can be reviewed more frequently if the student's parents or school asks for a review. 20 U.S.C. § 1414(d)(4).

In February 2008, the student's parents e-mailed a list to the school psychologist of supplementary aids and services they believed were necessary for the student to participate in extracurricular and non-academic activities, to be discussed at the student's upcoming IEP team meeting. The list included that the student be allowed to miss some practices and games to manage health concerns and stress, be provided adult supervision after the activity until an adult or the activity bus picked her up, and have access to her cell phone during the activity. The student's IEP team convened twice during February and March 2008. The parents allege that the School District refused to discuss the proposed supplementary aids and services at either meeting. The parents further allege that the School District told the parents that Section 504 plans, not IEPs, address participation in extracurricular and nonacademic activities.[1] The School District alleges that the parents asked the School District to hold a

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[1] Section 504, a civil rights statute, refers to the Rehabilitation Act of 1973, which prohibits programs receiving federal financial assistance from excluding, denying benefits to, or discriminating against otherwise qualified individuals with disabilities. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; 29 U.S.C. § 794 (2006). The procedural safeguards available to protect against a Section 504 violation are different than those available to protect against an IDEA violation. *Compare* 29 U.S.C. § 794(d) (citing 42 U.S.C. §§ 12111-117, 12201-204, 12210 (2006)) (Section 504) *with* 20 U.S.C. § 1415 (2006) (IDEA).

A Section 504 meeting is attended by "a group of persons, including persons knowledgeable about the child, [the child's evaluative data], and the placement options." 34 C.F.R. § 104.35(c)(3) (2010). Individual school districts determine which parties must be included in their policy for implementing Section 504.

Section 504 meeting to discuss supplementary aids and services for extracurricular activities, which the parents dispute.[2]

Two Section 504 meetings occurred in April and May of 2008. In April, the parents met with the middle school activities director and special education coordinator to discuss the student's participation in volleyball and after-school clubs. The Section 504 draft plan that resulted did not include the parents' suggested supplementary aids and services. In May, the parents met with the special education coordinator and Section 504 coordinator to determine what supplementary aids and services were required for the student to attend a class graduation party. The School District asserted it was not responsible for accommodating the student's attendance at the party because the party took place off-site, outside the normal school day, and was hosted by the parent-teacher organization, a private group.[3]

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[2] The Department's complaint decision resolves this factual dispute in favor of the parents based on e-mail exchanges between the parents and the School District and based on the School District's repeated statements that an IEP does not address supplementary aids and services for participation in extracurricular and nonacademic activities not related to receiving a free appropriate public education. We review an agency's factual determinations for whether the determination is supported by substantial evidence. *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 258-59, 251 N.W.2d 350, 356 (1977). Here, the record provides substantial evidence to support the Department's determination.

[3] The Department did not seek review of the court of appeals' conclusions with respect to the graduation party. The Depart-

The parents filed an IDEA complaint with the Department. On July 15, 2008, the Department issued a complaint decision concluding that the School District violated the IDEA regulations when it failed to convene an IEP team to consider the student's participation in volleyball, after-school clubs, and the graduation party.[4] The Department ordered the School District to convene the IEP team to discuss and document the IEP supplementary aids and services that the team determined appropriate and necessary for the student to participate in the extracurricular and nonacademic activities requested by the parents.

The School District appealed the Department's order. The court of appeals upheld the Department's decision in part. *ISD No. 12*, 767 N.W.2d at 491. The court affirmed the Department's determination that the IEP team must consider whether an

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ment's petition for review addresses only the student's participation in volleyball and after-school clubs.

[4] The complaint decision also concluded that (1) the School District violated 34 C.F.R. § 300.321 (2010), by permitting a general education teacher to leave an IEP team meeting early, without the written agreement of the parents, and failing to include required team members at subsequent team meetings to discuss the provision of supplementary aids and services that should have been considered for inclusion in the IEP; (2) the School District violated 34 C.F.R. § 300.503 (2010) and Minn. R. 3525.3600 (2009), by failing to provide prior written notice concerning its consideration and refusal of the parents' request to include supplementary aids and services in the IEP; and (3) the School District did not violate confidentiality requirements under 34 C.F.R. §§ 300.622 or 300.623 (2010). Issues regarding meeting attendance, written notice, and confidentiality were not appealed to this court.

extracurricular and nonacademic activity should be included in the IEP and, if so, what supplementary aids and services are necessary to enable the student's participation. *Id.* But the court reversed the Department's determination that supplementary aids and services for an extracurricular or nonacademic activity may be included in an IEP "regardless of a nexus between the activity and an appropriate education for the child." *Id.* Rather, the court held that an IEP need include supplementary aids and services necessary for the student's participation only in "such activities as are required for the education of the child." *Id.* at 486. The Department petitioned for review, arguing that the IDEA regulations require an IEP team to consider supplementary aids and services for participation in extracurricular and nonacademic activities regardless of an activity's relationship to an educational objective.

I.

Originally enacted in 1975 as the Education for All Handicapped Children Act, the Individuals with Disabilities Education Act (IDEA) governs how states and agencies that receive special education funding from the federal government provide education to disabled students. *See generally* Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1482 (2006)). The purposes of IDEA are to provide a free appropriate public education, ensure and protect the rights of disabled students, assist states and localities to provide special education, ensure that educators and parents have the tools needed to improve results in special education, and assess and ensure effectiveness of special education. 20 U.S.C. § 1400(d) (2006). To be eligible to receive IDEA

funds, states must establish policies to ensure that the state provides a free appropriate public education, establishes a "[f]ull educational opportunity goal," executes IEPs according to statutory requirements, and educates the disabled student to the maximum extent appropriate with other children. 20 U.S.C. § 1412(a)(1)-(2), (4)-(5) (2006).

A free appropriate public education is defined as special education and related services that are provided without charge at public expense and under public supervision, meet state educational standards, include appropriate education at all levels in the state, and are provided in conformity with an IEP. 20 U.S.C. § 1401(9) (2006). An IEP is a written statement provided for each special education student. 20 U.S.C. § 1401(14) (2006). Each IEP must be developed, reviewed, and revised in accordance with IDEA requirements. *Id.* Under IDEA, an IEP includes the following: (1) a statement of the child's present academic achievement and functional performance; (2) a statement of measurable academic and functional goals; (3) a description of how a child's progress towards meeting goals will be measured; (4) a statement of the special education and related services, and supplementary aids and services that will be provided for the child; an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular classes and activities; and (6) a statement of individual, appropriate accommodations necessary to measure academic achievement and functional performance on state and district-wide assessments. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VI).

This case focuses on the fourth item mentioned above: a statement of the special education, related services, and supplementary aids and services to be provided to or on behalf of the child. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This part of an IEP must also include a statement of program modifications or supports to be provided for the child to advance the student toward attaining annual goals, be involved in and make progress in the general curriculum, participate in extracurricular and other nonacademic activities, and be educated and participate with other children in activities. *Id.* Although under IDEA a student's IEP must include a statement of program modifications to be provided for the student to participate in extracurricular and other nonacademic activities, IDEA does not define extracurricular and nonacademic activities. *See* 20 U.S.C. § 1401. Therefore, we turn to the federal regulations promulgated pursuant to IDEA.

II.

Federal regulations promulgated pursuant to IDEA reiterate and supplement statutory provisions. *See generally* 34 C.F.R. Part 300 (2010). IDEA provides that the Secretary of Education shall issue regulations to ensure compliance with IDEA requirements. 20 U.S.C. § 1406(a) (2006). The Secretary may not implement or publish a regulation or issue a policy letter or other statement that violates or contradicts IDEA. 20 U.S.C. §§ 1406(b)(1), 1406(d) (2006). The Secretary may also not implement or publish a regulation that "lessens the protections provided to children with disabilities under [IDEA]," except to the extent the regulation reflects the "clear and

unequivocal intent of Congress in legislation." 20 U.S.C. § 1406(b)(2) (2006).

We review the regulations to find a definition of "extracurricular and nonacademic activities." More specifically, we review the regulations to determine whether the definition of "extracurricular and nonacademic activities" for which supplementary aids and services must be provided is limited to only those activities required for the education of the child. Interpreting a regulation is a question of law reviewed de novo. *See In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W.2d 497, 503 (Minn. 2007). As with statutes, when interpreting a regulation, the court first determines whether the regulation is "clear or ambiguous on its face." *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 732 (Minn. 2008). If the regulation is unambiguous, the court construes the regulation according to the common and approved usage of its words and phrases and does not disregard the regulation's plain meaning to pursue its spirit. *See* Minn. Stat. §§ 645.08, 645.16 (2008); *Risdall*, 753 N.W.2d at 732.

The parties here focus on three IDEA regulations: 34 C.F.R. §§ 300.320, 300.107, and 300.117 (2010). The first regulation, section 300.320, was promulgated pursuant to 20 U.S.C. § 1414(d)(1)(A), and defines the required contents of an IEP. Nearly verbatim to its statutory counterpart, section 300.320 states that an IEP must include:

> (4) [a] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or

> on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child . . .
>
> (ii) [t]o be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities . . . .

34 C.F.R. § 300.320(a)(4).

The second regulation, section 300.107, defines free appropriate public education as it relates to state eligibility for federal funding. Section 300.107 states:

> The State must ensure the following:
>
> (a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
>
> (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

The third regulation, section 300.117, requires that disabled students be educated to the maximum extent appropriate, with nondisabled students, including participating in extracurricular and nonacademic activities and receiving necessary supplementary aids and services for such participation. Section 300.117 states:

> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

We consider whether the plain language of the above IDEA regulations limits extracurricular and nonacademic activities reflected in an IEP to those required to educate the disabled student. Section 300.320(a)(4) requires that supplementary aids and services to the maximum extent appropriate to the needs of the student necessary to enable the disabled student to participate in extracurricular and nonacademic activities be included in the student's IEP. The section does not modify or restrict the meaning of "extracurricular and nonacademic activities" for which supplementary aids and services must be provided.

Furthermore, section 300.107 requires a school district to take steps to provide those supplementary aids and services that have been determined appropriate and necessary by the IEP team to afford the disabled student an equal opportunity to participate in extracurricular and nonacademic activities. Section 300.107(b) provides a nonexhaustive list of examples of extracurricular and nonacademic activities.[5] Section 300.107(b) expressly includes athletics, clubs, and activities offered by groups sponsored by the school district.[6] But the section does not otherwise limit those extracurricular and nonacademic activities eligible for inclusion in the IEP.

Section 300.117 requires that a disabled student receive supplementary aids and services determined necessary and appropriate for participation in nonacademic settings and further requires that the disabled student participate in extracurricular and nonacademic activities to the maximum extent appropriate with nondisabled students. Section 300.117 does not limit what qualifies as an

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[5] The extracurricular and nonacademic activities listed in section 300.107(b) are "counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available." Section 300.117 also lists meals and recess as extracurricular and nonacademic activities for which supplementary aids and services must be provided.

[6] The activities at issue in this case—volleyball, after-school clubs, and a graduation party held by a School District-sponsored group—fall within the scope of section 300.107(b).

extracurricular and nonacademic activity. Instead, the section further defines extracurricular and nonacademic activities to include meals and recess as well as the activities listed in section 300.107(b).

Overall, the plain language of sections 300.320(a)(4)(ii), 300.107, and 300.117 does not limit extracurricular and nonacademic activities for inclusion in an IEP to those required to educate the disabled student. To limit extracurricular and nonacademic activities to those required only to educate the disabled student would require adding or reading words into the above IDEA regulations. As with statutes, we will not read into a regulation provisions that the promulgating entity has omitted, either purposefully or inadvertently. *Cf. Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). Because sections 300.320(a)(4)(ii), 300.107, and 300.117 do not limit extracurricular and nonacademic activities included in an IEP to those required to educate the disabled student, we decline to read such a limitation into the IDEA regulations.

Other IDEA regulations expressly limit their application to services necessary to provide a free appropriate education. For example, 34 C.F.R. § 300.105(b) (2010) states: "On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE [free appropriate public education]." Similarly, 34 C.F.R. § 300.106 (2010) states that each school district "must ensure that extended school year services are available as necessary to provide FAPE [free appropriate public education]" and that

"[e]xtended school year services must be provided only if a child's IEP Team determines . . . that the services are necessary for the provision of FAPE [free appropriate public education] to the child." A free appropriate public education encompasses only services necessary to provide disabled students with educational and instructional benefits. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203-04 (1982). Given the free appropriate public education limitations on 34 C.F.R. §§ 300.105(b) and 300.106, it is clear that the Secretary of Education understood how to limit the application of an IDEA regulation to services that provide educational and instructional benefits. Thus, the federal government could have limited extracurricular and nonacademic activities included in sections 300.320(a)(4)(ii), 300.107, and 300.117 to those required for the education of the disabled student. Despite opportunity and ability, the Secretary articulated no such limitation here.[7]

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[7] The School District argues that to interpret "extracurricular and nonacademic activities" to include activities not required to educate disabled students renders the regulation ultra vires. A regulation is ultra vires if it exceeds the scope of power authorized by statute. *See Black's Law Dictionary* 1662 (9th ed. 2009) (defining "ultra vires" as "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law."). As noted, IDEA requires the Secretary of Education to implement and publish regulations necessary to ensure compliance with specific IDEA provisions so long as the regulations do not lessen protections afforded disabled children under the Act. 20 U.S.C. §§ 1406(a), 1406(b). IDEA requires that an IEP include a statement of supplementary aids and services to be provided to a disabled child to facilitate the child's participation in extracurricular and nonacademic activities. 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb). The statute does not limit the meaning

Beyond not limiting what extracurricular and nonacademic activities may be included in an IEP, the plain language of the IDEA regulations establishes the manner in which school districts must provide access to extracurricular and nonacademic activities. Section 300.107(a) requires that school districts take steps to provide extracurricular and nonacademic activities in a manner necessary to afford the disabled student an *equal* opportunity to participate. On this point, the court of appeals' holding contravenes the plain language of section 300.107. The court held that an IEP need only include activities required for the education of a disabled student. *ISD No. 12*, 767 N.W.2d at 486. Such a holding effectively requires a disabled student to prove that he or she will receive an educational benefit from participating in an extracurricular and nonacademic activity in order to receive the supplementary aids and services necessary to participate. Nondisabled students are required to make no such showing. Requiring disabled students to prove an educational benefit, when nondisabled students need not, does not afford disabled students an equal opportunity to participate in extracurricular and nonacademic activities. Thus, the court of appeals' holding violates the "equal opportunity" for participation in extracurricular and nonacademic

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of "extracurricular and nonacademic activities." *See* 20 U.S.C. § 1414 (2006). The corresponding regulation, section 300.107, also does not limit the scope of "extracurricular and nonacademic activities." Section 300.107 is necessary to ensure compliance with 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb), and it does not lessen protections afforded disabled children under IDEA. Thus, the Secretary possessed adequate power to implement the regulation. The implementation of section 300.107 is therefore not ultra vires, and we interpret it according to its plain language.

activities required by the plain language of section 300.107.

The court of appeals held that the IEP team should consider whether a disabled student's participation in an extracurricular and nonacademic activity is appropriate. *See ISD No. 12*, 767 N.W.2d at 487. The court further held that IDEA does not permit parents to dictate unilaterally the content of an IEP. *Id.* We agree. Section 300.117 states that a school district must ensure that a disabled student participates in extracurricular and nonacademic activities with nondisabled students to the maximum extent "appropriate to the needs of that [disabled student]." As the court of appeals noted, the phrase "appropriate to the needs" indicates that a disabled student may participate in extracurricular and nonacademic activities that are "appropriate." The plain language of the IDEA regulations indicates that the IEP team is designated to determine which activities are "appropriate." *ISD No. 12*, 767 N.W.2d at 487. For example, section 300.107(a) states that a school district must provide supplementary aids and services "determined appropriate and necessary by the [student]'s IEP Team" to participate in extracurricular and nonacademic activities. Similarly, section 300.117 requires that a school district ensure that a disabled student has the supplementary aids and services "determined by the [student]'s IEP Team to be appropriate and necessary for the [student] to participate in nonacademic settings." Accordingly, we affirm the court of appeals' holding that the IEP team must determine whether an extracurricular and nonacademic activity is appropriate for a disabled student and which supplementary aids and services

are appropriate and necessary to participate in these activities.

In sum, the plain language of IDEA regulations 34 C.F.R. §§ 300.320(a)(4)(ii), 300.107, and 300.117 establishes that the extracurricular and nonacademic activities that may be included in an IEP are not limited to those activities required to educate the disabled child. The plain language of the regulations further establishes that a disabled student's IEP team is the appropriate entity to determine what activities are appropriate for inclusion in the student's IEP.[8] Accordingly, we reverse the court of appeals in part, affirm in part, and reinstate the Department's order consistent with this opinion.

Affirmed in part and reversed in part.

PAGE, J., took no part in the consideration or decision of this case.

STRAS, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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[8] Both the School District and the Minnesota School Boards Association, in an amicus curiae brief, argue that a broader interpretation of "extracurricular and nonacademic activities" will impose additional administrative and fiscal burdens on school districts. The Department does not agree. We are not unsympathetic to concerns of increased administrative and fiscal burdens on school districts. But the court may only consider the effects of a particular regulatory interpretation if the regulation is ambiguous. *See* Minn. Stat. § 645.16. In this case, we hold that the regulation is unambiguous and interpret only its plain language. Thus, we may not consider the budgetary effects, if any, of any particular interpretation.

CONCURRENCE & DISSENT

ANDERSON, G. Barry, Justice (concurring in part, dissenting in part).

I concur in the opinion of the court insofar as it holds that the responsibility of determining which activities are appropriate for a student rests with the IEP team, but I disagree that the statutes and regulations do not require some consideration of the connection of an extracurricular activity to the educational needs of a student.

The majority states that "the plain language of sections 300.320(a)(4)(ii), 300.107, 300.117 does not limit extracurricular and nonacademic activities for inclusion in an IEP to those required to educate the disabled student." *Supra* at 12. That is true; those words are not found there. The majority further states that "[r]equiring disabled students to prove an educational benefit, when nondisabled students need not, does not afford disabled students an equal opportunity to participate in extracurricular and nonacademic activities." *Supra* at 15.

After underscoring the requirement of equal opportunity to participate in extracurricular and nonacademic activities, however, the majority states that "[t]he plain language of the IDEA regulations indicates that the IEP team is designated to determine which activities are 'appropriate.' . . . Accordingly, . . . the IEP team must determine whether an extracurricular and nonacademic activity is appropriate for a disabled student." *Supra* at 15-16. Thus, equal opportunity to extracurricular activities is not equal opportunity to any and all activities, but only

those activities that the IEP team deems appropriate. This begs the question of what is appropriate and how the IEP team is to go about making such a determination.

In assigning this gatekeeper duty to the IEP team, the majority relies in part on section 300.117, which refers to appropriateness "to the needs of that child." To me, it is necessary for the IEP team in making its assessment of appropriateness to look at the needs of the child. This, of course, requires asking what the needs of the child are and what sort of needs the IEP team is supposed to consider. Section 300.324 provides some guidance by stating that "[i]n developing each child's IEP, the IEP Team must consider . . . [t]he academic, developmental, and functional needs of the child." I view these, generally speaking, as "educational" needs. Therefore, I would hold, like the majority, that parents of a disabled child cannot unilaterally dictate the content of an IEP, and that when an IEP team is determining which supplementary aids and services are appropriate and necessary for nonacademic and extracurricular services, the team must first consider whether the nonacademic and extracurricular services are appropriate. But I would further hold that the IEP team's determination of which nonacademic and extracurricular services are appropriate necessarily involves consideration of the child's educational needs. The use of the word "appropriate" indicates that not all nonacademic settings or extracurricular activities are suitable.

IDEA is an ambitious piece of legislation laudably aimed at securing and furthering the education of disabled children, and IDEA has far-reaching effects.

In Minnesota alone, 14.7% of students are receiving special education services under an IEP. Given that high number, coupled with the fact that section 300.324(b)(i) requires periodic review of each child's IEP, it is easy to see that any interpretation of the regulations and statutes requires a delicate balance of furthering the education of disabled children with feasible requirements for school districts.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

A08-1600

[Filed June 23, 2009]

Independent School District No. 12, Centennial, Relator,	)
vs.	)
Minnesota Department of Education, Respondent.	)

Affirmed in part and reversed in part
Minge, Judge

Minnesota Department of Education
File No. 08-082C

Paul C. Ratwik, Nancy E. Blumstein, Erin E. Ische, Ratwik, Roszak & Maloney, P.A., 300 U.S. Trust Building, 730 Second Avenue South, Minneapolis, MN 55402 (for relator)

Lori Swanson, Attorney General, Martha J. Casserly, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Larkin, Judge.

SYLLABUS

1. The federal Individuals with Disabilities Education Act (IDEA) requires that a child's individualized education program (IEP) include the supplementary aids and services necessary to support that child's participation in selected extracurricular and nonacademic activities that the IEP team determines to be part of an appropriate education for that child.

2. Under IDEA, an IEP need not include supplemental aids and services (accommodations) related to a child's participation in an extracurricular activity that the IEP team determines is not required for an appropriate education of that child.

3. The procedural requirements of IDEA apply to a complaint challenging the failure to include content allegedly required in an IEP.

OPINION

MINGE, Judge

This case involves a fifth-grader, her parents, the administration of the school district, and the Minnesota Department of Education (MDE). The child has a disability and participates in special education. This appears simple. However, because special education is set up and governed by detailed legislation and regulations, special education programs involve numerous complexities and acronyms. Relator,

Independent School District No. 12 (the district), appeals a decision issued by respondent MDE. The decision was in response to a complaint by the child's parents pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482 (2006). Relator asserts that, in ruling on the parents' complaint, MDE erred in concluding that (1) it (the school district) violated IDEA by failing to list in the child's individualized education program (IEP) supplementary aids and services needed by the child to participate in extracurricular and other nonacademic activities that the parents had selected for her; (2) the parents could utilize IDEA complaint procedures when the district failed to address those supplementary aids and services in the IEP; and (3) the district was responsible for providing supplementary aids or services for the child at a fifth-grade graduation party sponsored by a parent-teacher organization (PTO). We affirm in part and reverse in part.

FACTS

In January 2008, the district conducted a required three-year reevaluation of the child. As a part of this reevaluation, the district discussed with the parents proposed accommodations[1] for the student in her classes and otherwise. Necessary accommodations were to be incorporated in the child's new 2008-09 IEP. On February 7, in advance of a meeting of the IEP

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[1] The parties appear to use the terms "accommodations" and "supplementary aids and services" interchangeably. The latter is the term found in the pertinent IDEA statutes and regulations. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

team, the parents proposed accommodations for their daughter's participation in extracurricular activities. The proposed accommodations included special supervision after the regular school day and allowing their daughter to miss some practices or games. At that time, the parents did not identify, and the proposed accommodations did not relate to, any particular extracurricular activity.

On February 29, 2008, an IEP meeting was held. There is a factual dispute over what happened at that meeting incident to the parents' requested accommodations for extracurricular activities. The district contends that the parents and the district agreed that, because the child had not signed up for any specific activities, no accommodations had to be included in the 2008-09 IEP. The district adds that it was agreed that, if the child decided to participate in a specific activity, she had a right to equal treatment under section 504 of the Rehabilitation Act of 1973,[2] that the parents could require that the district prepare a plan for equal treatment under section 504 (instead of in the IEP), and that the district would comply with its obligations under a section 504 plan. The parents assert, and MDE found, that at the February 29 IEP meeting and at a subsequent IEP meeting held in March, district staff insisted that extracurricular activities could be addressed only in a section 504 plan and refused to discuss accommodations related to these activities. No

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[2] Section 504 "prohibits discrimination against the disabled by recipients of federal funding." *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100 (2002). Section 504 is codified at 29 U.S.C. § 794 (2006).

accommodations for extracurricular activities were included in the proposed IEP for 2008-09.

After the March 2008 meeting, the parents objected in writing to the proposed IEP. They also requested more information about "extracurricular/non-academic accommodations"; that "supervision at clubs . . . [be] written into [their daughter's] IEP"; and that the IEP include some consideration of "nonacademic (Band)" activities; and they stated their position that the IEP team was legally required to consider extracurricular activities. In April 2008, the parents and district staff met to discuss extracurricular activities. The parents explained that they wanted to explore having their daughter participate in after-school clubs and volleyball. The district admits that, at that April meeting, the parents and district staff discussed a "specific [extracurricular] activity occurring in the fall of 2008," and what accommodations would be necessary for the child to participate in that activity. However, the district claims that the meeting had nothing to do with the child's "IEP or general education regular school day services" but was merely held to "determine eligibility for [section] 504 accommodations."

In May 2008, the parents met with district staff to discuss possible accommodations consisting of supplementary aids and services that could be furnished by the district at a fifth-grade graduation party sponsored by the PTO. The district determined that, because the PTO was a separate organization from the district and because the event was held offsite and outside the school day and was not district-funded, the district was not responsible for and

would not provide supplementary aids or services for the child's attendance at the event.

The parents filed a complaint with MDE, the agency responsible for overseeing compliance with the IDEA in Minnesota. On July 15, 2008, MDE issued its decision, determining, as relevant to this appeal, that (a) the district violated IDEA regulations by failing to document in the IEP the accommodations necessary for the child to participate in extracurricular or other nonacademic activities, including the graduation party; and (b) the district failed to provide prior written notice concerning its refusal regarding accommodations. MDE ordered the district to implement the following corrective action: convene the child's IEP team "to discuss supplementary aids and services the [s]tudent may need in the extracurricular and other nonacademic activities [her parents] have selected for her"; (2) document these accommodations in a revised IEP; and (3) develop a district-wide policy and inform staff and parents that the IEP team is required by law to document accommodations to enable children to participate in extracurricular and other nonacademic activities. This certiorari appeal followed.

ISSUES

I. Did MDE err by requiring the district to include in the child's IEP accommodations necessary for the child to participate in selected extracurricular and nonacademic activities?

II. Did MDE err by concluding that the procedural requirements of IDEA were applicable to a complaint alleging the failure to include in an

IEP accommodations for extracurricular and nonacademic activities required by IDEA?

III. Did MDE err by concluding that the PTO-sponsored graduation party was an activity subject to the accommodation requirements of IDEA?

ANALYSIS

The Minnesota Constitution charges the legislature with the responsibility of establishing a uniform system of public schools. Minn. Const. art. XIII, § 1. Minnesota Statutes chapters 119A-127A address school finance, attendance, curriculum, school calendar, teachers, student conduct and rights, special education, and related subjects. Minnesota requires school districts to provide special education instruction and services for children with disabilities. Minn. Stat. § 125A.03(a) (2008). Generally, the state statutes governing special education refer to federal law. *Id.*; Minn. Stat. §§ 125.05(a), .08(a)(4) (2008). Because the parties do not assert any independent state-law basis for deciding the issues on appeal, we do not further consider Minnesota law.

IDEA ensures "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Special Sch. Dist. No. 1 v. E.N.*, 620 N.W.2d 65, 68-69 (Minn. App. 2000). The phrase "free appropriate public education" is often referred to by the acronym FAPE and expresses a fundamental principle of

special-education law. IDEA defines FAPE to mean special education and related services that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program [IEP] required under [20 U.S.C. § 1414(d).]

20 U.S.C. § 1401(9).

MDE is the state agency in Minnesota responsible for overseeing local school district compliance with IDEA. 20 U.S.C. § 1412(a)(11); Minn. Stat. § 120A.02(b) (2008). As part of its duties, MDE investigates complaints that a local school district is not providing required services to children with disabilities. 34 C.F.R. §§ 300.151-.153 (2008). If MDE finds that a local school district violated special education requirements, it must order the district to remedy the denial of those services, including "corrective action appropriate to address the needs of the child." 34 C.F.R. § 300.151(b)(1).

We observe a narrow scope of review in considering an appeal from an agency decision.

> When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of

> correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.

In re Excess Surplus Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted).[3] The decision of MDE in this area of IDEA oversight will not be reversed by this court unless it (1) reflects an error of law; (2) is arbitrary and capricious; or (3) is unsupported by the evidence. *Indep. Sch. Dist. No. 281 v. Minn. Dep't of Educ.*, 743 N.W.2d 315, 321 (Minn. 2008).[4]

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[3] MDE argues that we owe a high degree of deference to the legal interpretations of the relevant federal regulations presented in the complaint decision. While we afford high deference to official agency action and interpretation of its regulations in certain circumstances, *In re Cities of Annandale & Maple Lake NPDES / SDS Permit Issuance for the Discharge of Treated Wastewater (Annandale)*, 731 N.W.2d 502, 516 (Minn. 2007), we are not persuaded that this MDE complaint decision is owed that degree of deference. The record indicates that the complaint was investigated by MDE's Division of Compliance and Assistance and that the decision was rendered by this division. This appeal is from that decision. Because it is unclear whether the complaint decision is a deliberate policy decision of MDE, as an agency, on the legal issue or is akin to the position of a hearing officer and because there is no showing that this interpretation of IDEA statutes and regulations is a technical or scientific matter different from questions generally considered by courts, we do not defer to the complaint decision on this interpretation of statutes and regulations. *Cf. Annandale*, 731 N.W.2d at 516 (reviewing action by Minnesota Pollution Control Agency on complex technical-scientific matters).

[4] IDEA is Spending Clause legislation. U.S. Const. art. I, § 8, cl. 1; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291,

We review the sufficiency of evidence supporting an agency's decision by applying the substantial-evidence test. *Hurrle v. County of Sherburne ex rel. Bd. of Comm'rs*, 594 N.W.2d 246, 249 (Minn. App. 1999). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). We give considerable judicial deference to administrative fact-finding, *id.*, and apply an abuse-of-discretion standard of review. *Carter v. Olmsted County Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 730 (Minn. App. 1998).

295, 126 S. Ct. 2455, 2458 (2006). The substantive requirements contained in IDEA come in the form of conditions placed on a state's receipt of federal funds. 20 U.S.C. § 1412(a). This informs our inquiry because, as Spending Clause legislation, IDEA should be viewed "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." *Murphy*, 548 U.S. at 296, 126 S. Ct. at 2459. In other words, the legislation should be viewed as a contract, and no obligations should be deemed to be imposed unless there is clear notice of the obligations. *Id.* We are aware that, when the language of a regulation is unclear or susceptible to different interpretations, we are to consider whether, based on several factors, to afford a level of deference to an agency's interpretation of the regulation. *Annandale*, 731 N.W.2d at 516. Nonetheless, we are reluctant to interpret federal law to impose additional obligations on the state, where the purported requirement is not clearly and unambiguously stated in the applicable federal legislation and MDE has not pointed to any previous adoption of this position in Minnesota that would give clear notice to those affected.

I.

The first and primary issue is whether MDE erred in interpreting IDEA and its implementing regulations to require school districts to include in IEPs the supplementary aids and services (accommodations) needed for a child to participate in extracurricular and nonacademic activities identified for that child by her parents.

A. Application of IDEA to Extracurricular and Nonacademic Activities

An IEP is a plan that "sets out the child's educational performance, establishes annual and short term objectives for improvement in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Moubry v. Indep. Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1091 n.4 (D. Minn. 1998). Federal law defines an IEP, what must be contained in an IEP, and who is required to write and authorized to amend the IEP. 20 U.S.C. § 1414(d). A fundamental aspect of IDEA is that a child's IEP is developed by a team that consists of, at minimum, the child's parents, a regular education teacher, a special education teacher, and a qualified representative of the school district. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321 (2008). When constructing an IEP, the IEP team must meet to consider (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of the child; (3) the results of the child's formal evaluation; and (4) the child's academic, developmental, and functional needs. 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a) (2008). Although parents are recognized as an integral part of the IEP team that formulates the IEP, section

1414(d) does not provide that parental concerns take precedence over the collaborative, reasoned decision-making of the team.

MDE points to specific language in IDEA providing that an IEP must contain

> (IV) a statement of the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
>
> . . . .
>
> (bb) to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities[.]

20 U.S.C. § 1414(d)(1)(A)(i)(IV). MDE argues that an IEP team must consider the aids and services necessary to support a child's participation in extracurricular and nonacademic activities, regardless of their nexus to educational needs.

MDE also points to U.S. Department of Education (DOE) regulations and accompanying commentary regarding extracurricular and nonacademic activities and the IEP. *See* 34 C.F.R. § 300.320(a)(4)(ii) (2008) (requiring statement in IEP of aids and services that will be provided to enable a student "to participate in extracurricular and other nonacademic activities"). In promulgating revised IDEA regulations in 2006, the DOE stated:

> States must ensure that public agencies take steps to provide nonacademic and extra-curricular services and activities, including providing supplementary aids and services determined appropriate and necessary by the child's IEP Team to afford children with disabilities an equal opportunity for participation in those services and activities.

Supplementary Aids and Services, 71 Fed. Reg. 46578 (Aug. 14, 2006). In 2006, DOE regulations were revised to expand the statutory definition of "supplementary aids and services" as follows:

> Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, *and in extra-curricular and nonacademic settings*, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.

34 C.F.R. § 300.42 (2008) (emphasis added to indicate new language); *cf.* 34 C.F.R. § 300.28 (2006) (modified and renumbered in 2006). The new language in the regulations differs from the statutory language. *See* 20 U.S.C. § 1401(33) (defining "supplementary aids and services" as "aids, services, and other supports that are provided in regular education classes *or other education-related settings*" (emphasis added)). However, the regulation maintains as a point of reference the requirement that these accommodations are "to enable children . . . to be *educated*." 34 C.F.R. § 300.42 (emphasis added).

The district asserts that our determination of the appropriate contents of a child's IEP is limited by the concept of FAPE. The district argues that FAPE does not encompass extracurricular and nonacademic activities unless they are deemed necessary to advance a child's general education. Although this position appears logical, the analysis is awkward because the definition of FAPE expressly incorporates the contents of an IEP. 20 U.S.C. § 1401(9)(D). For this reason, the definitions of and interrelationship between FAPE and IEP have a circular quality.

Based on the language of the statute and regulations, we conclude that MDE was correct in determining that a child's IEP team has an obligation to *consider*, based on the student's overall situation and parental requests, whether the child's IEP should include a specific extracurricular activity and, if so included, identify the supplementary aids and services necessary for that child's participation in the activity. However, as concluded below, the IEP need only include such activities as are required for the education of the child. We reject the district's present assertion[5] that the IEP team has no duty to consider the parents' request for accommodations for such activities, and we agree with MDE that it has the authority to order the district to convene an IEP team to consider the request and to make determinations in accordance with this opinion. Also, as further addressed below, we reject the relator's claim that, as a school district, it may require that the parents' challenge to the delivery of aids and services be

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[5] MDE points out that the district's legal positions have changed as this controversy has proceeded.

addressed exclusively through a section 504 plan pursuant to 29 U.S.C. § 794(a).

B. Identifying Activities—Generally

While it is clear that an IEP must list supplementary aids and services (accommodations) that "will be provided" in support of extracurricular and nonacademic activities, it is less apparent what specific activities must be included in the IEP. MDE takes the position that parental selection of an extracurricular activity, without consideration of the activity's relationship to the child's educational needs, requires that the child's IEP include the activity and list accommodations for that child to participate in the activity.

The DOE regulations require that children with disabilities be provided with an equal opportunity to participate in extracurricular and nonacademic activities. 34 C.F.R. § 300.107(a) (2008). The regulations explain that the duty to provide an equal opportunity means that "each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent *appropriate to the needs of that child*." 34 C.F.R. § 300.117 (2008) (emphasis added). Implicit in this language is the IEP team's discretion to determine whether participation in an activity is appropriate. We conclude that, under the statutory scheme, this discretion necessarily rests with the IEP team. It is not a parental prerogative to require accommodations for every activity that the parent may identify.

MDE stated at oral argument that the federal statute and/or regulations had been modified in 2002 or 2004 to effectively embrace a requirement that the IEP include parent-selected activities. However, none of the changes to the statute in that time frame addressed this question. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.); George Miller, Comm. on Educ. and Labor, U.S. House of Representatives, *Key Changes in the Individuals with Disabilities Education Act (IDEA)* (2007), *available at* http://edlabor.house.gov/publications/IDEA2004keychanges.pdf.

The regulations were modified in 2006 in order to implement the 2004 Congressional changes to IDEA. 71 Fed. Reg. 46540-46845 (Aug. 14, 2006). Although 34 C.F.R. § 300.42 was modified in 2006 to expressly mention extracurricular activities, as previously noted, it also retains the word "educated" as a touchstone of its requirements. This confirms that, for those activities to be addressed in an IEP, there must be some connection to an educational objective. While commentary from the DOE in the Federal Register could be read as requiring accommodations for extracurricular activities regardless of any nexus to education, at no point do the comments expressly state that position. *See* 71 Fed. Reg. at 46541, 46583, 46589, 46670.

We also note that other modifications to the regulations do not contain any language that would extend IDEA to such activities regardless of educational nexus. *Compare* 34 C.F.R. § 300.107(a) (2008), *with* 34 C.F.R. § 300.306(a) (2008), *and* 34

C.F.R. § 300.117 (2008), *with* 34 C.F.R. § 300.553 (2002). The change is to explicitly state the obligation of the school to provide "supplementary aids and services" (accommodations) in the extracurricular area. There is no language that this includes any obligation to do so regardless of educational nexus. Given the pervasive popularity of extracurricular activities in our schools, the change claimed by MDE would be significant. If indeed such a change was intended, clear, explicit language to that effect, plus commentary, guidelines, and even bulletins or instruction might be expected, but MDE has not referenced any.

Our analysis is informed by the prominence of the word "education" in the law and regulations. IDEA and its implementing regulations are honeycombed with the word "education." This starts with the title of the act itself and extends into the language of virtually every section of the regulations. There are some statements, such as the language in 20 U.S.C. § 1414 (d)(l)(A)(IV)(bb) and 34 C.F.R. § 300.320(a)(4)(ii), which require accommodations for extracurricular activities without any reference to education, but then there are cross-references that limit the scope of the mandate to what is in section 614 of IDEA. *See* 34 CFR § 300.320(d)(l) (2008). This section of the original act, codified as 20 U.S.C. § 1414, is replete with references to education. Also of interest is the virtual lack of any reference in reported litigation, DOE directive, DOE circular, or even state regulation that would extend IDEA to require accommodations for extracurricular activities that have no nexus to a child's educational objectives.

Based on the foregoing analysis, we conclude that MDE erred in its interpretation of IDEA when it directed the district to provide accommodations for any extracurricular activity selected by a child's parent without regard to the nexus between the activity and educational needs and objectives. It is the IEP team's responsibility to determine whether a requested activity is appropriate for the child based on her strengths, the concerns for enhancing her *education*, the results of her evaluation, and her academic, developmental, and functional needs. *See* 20 U.S.C. § 1414(d)(3)(A) *and* 34 C.F.R. § 300.324(a). As previously stated, if the IEP team, in its discretion, determines that participation in a particular activity is appropriate for the education of that child, it must identify and list in the child's IEP the accommodations that will be provided in relation to that extracurricular activity.

C. Identifying Activities—For This Child

Finally, we consider the district's assertion that MDE erred in determining that the parents had timely and reasonably identified activities in which the child wished to participate. The district asserts that it cannot be required to anticipate the accommodations necessary for a student to participate in any or all of the more than 100 extracurricular and nonacademic activities offered to students, particularly when the student has not identified any activities in which he or she will participate.

Contrary to the district's representation on appeal, the record supports the MDE finding that in the spring of 2008 the child's parents identified specific activities in which they wished the child to participate that fall.

While the parents discussed general involvement in "clubs" and afterschool activities, they listed volleyball and band as activities in which the child apparently had shown interest. The district also concedes that, at a meeting with the parents in April 2008, the parents and district staff discussed a specific afterschool activity occurring in the fall of 2008, and, following the meeting, district staff, in drafting a section 504 plan for the student, noted accommodations relevant to that activity. In April, the student had not registered for any specific extracurricular activity for the fall or made any oral or written commitment to a fall activity. The record does not indicate that the parents requested a burdensome consideration of an unreasonable range of activities. Furthermore, the record does not indicate sign-up for fall activities was available in April, and the district does not explain why an explicit commitment or enrollment is necessary or legally required for an IEP team to discuss the child's potential participation in the activity.

Based on this record, we conclude there is substantial evidence supporting the MDE determination that the parents had adequately identified activities for the IEP team to consider. Although MDE did not err in ordering the district to reconvene the child's IEP team to discuss selected extracurricular and nonacademic activities, we have already stated that we conclude that MDE erred in ordering the district to include in the child's IEP accommodations that would be provided in connection with the parent-selected activities. That directive deprived the IEP team of the discretion to determine whether those activities are appropriate to the child's educational needs and objectives.

II.

The second issue is whether MDE erred by determining that the parents of a child receiving special-education services could utilize IDEA procedural remedies if the IEP team refuses to consider and the district does not address accommodations for the child's participation in extracurricular and other nonacademic activities in the child's IEP.

IDEA provides:

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

20 U.S.C. § 1415(a). The procedures include the right of the parent to make a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such a child." 20 U.S.C. § 1415(b)(6)(A); *see also* 34 C.F.R. § 300.507 (2008); Minn. Stat. § 125A.091 (2008) (requiring due-process procedures in similar circumstances). The definition of FAPE provided in section 1404 includes educational services and related services (accommodations) that "are provided in conformity with the [child's IEP]." 20 U.S.C. § 1404(9)(D). This is repeated in the federal regulations. 34 C.F.R. § 300.17

(2008).

The district asserts that this case does not involve the denial of FAPE and, therefore, IDEA procedural safeguards do not apply. As previously discussed, the statutory language in IDEA incorporates into the definition of FAPE the contents of a child's IEP. Accordingly, when a parent alleges that an IEP fails to include required information, that allegation is necessarily a challenge to the provision of FAPE.

The district asserts that MDE's determination that IDEA's complaint-handling procedures are applicable improperly preempted the process for enforcing compliance with section 504 actions. *See* 29 U.S.C. § 794. Section 504 provides certain rights to qualified persons and an enforcement process. Neither statute preempts the other. The district asserts that MDE further erred by assuming oversight of the district's compliance with section 504, with regard to which MDE has no enforcement authority.

We do not read MDE's order to address compliance with section 504, but rather to recognize that compliance with section 504 does not serve as a substitute for, or preempt compliance with, the IDEA. *See, e.g.*, *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 105 n.9 (2d Cir. 1998) (explaining that proposed plan under section 504 of the Rehabilitation Act is not an adequate substitute when an IEP is required: "Although the provision of an IEP under the IDEA will sometimes satisfy a district's § 504 obligations, the converse is not generally true." (citation omitted)). As already discussed, to the extent the parents believed that the district violated IDEA, they could file a complaint and seek relief pursuant to that process. If

the IEP team properly determines that IDEA does not require the requested accommodation, the parent may pursue relief under section 504. Therefore, we conclude MDE did not improperly preempt section 504.

III.

The last issue is whether MDE erred when it ruled that the district was responsible for providing accommodations for the child at the PTO graduation party. As we discussed above, if an IEP team determines that a particular extracurricular activity is appropriate to a child's educational needs, the IEP team must provide a statement of accommodations related to that activity in the child's IEP. The issue here is whether the graduation event is an extracurricular or nonacademic activity within the meaning of the IDEA and implementing regulations.

Nonacademic and extracurricular activities include "recreational activities" and "special interest groups or clubs sponsored by the public agency." 34 C.F.R. § 300.107(b) (2008). MDE determined that the PTO was a "special interest group or club sponsored by [the district]," that the class-wide graduation party was a "recreational activity," and that, as such, the IEP team was required to identify accommodations necessary for the student to have an equal opportunity to participate in that event. The record includes literature prepared by the district and the PTO that indicates some cooperation between the PTO and the student's school on programs and initiatives to benefit students.

In an era of tight school budgets and widespread parental and community interest in the development of young people, activities conducted apart from the

schools are not rare and should not be discouraged. Although such programs should not become a ploy to subvert IDEA, IDEA does not purport to reach into the conduct of bona fide, independent programs. Here, there is no factual dispute. This graduation party was an activity held away from school premises, was outside the school day, was not district-funded, and was not supervised by district staff. There is no evidence that the event was school initiated or that the PTO is a district-sponsored organization. IDEA does not require that schools provide special-education services at community events that involve children, even if they celebrate a school-related milestone.[6] Such a result would unreasonably expand the meaning of being "sponsored by" a district.

We conclude that the PTO graduation party is not within IDEA's definition of "nonacademic and extracurricular activities."

DECISION

We affirm MDE's determination that the parents identified an extracurricular activity sufficiently to require the child's IEP team to consider whether the activity should be in the child's IEP and, if so, what accommodations are appropriate. We reverse MDE's determination that the parents' request for accommodations for an extracurricular activity alone necessitates inclusion of accommodations for the activity in the child's IEP and its determination that such accommodations are required regardless of a

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[6] Our decision does not preclude a school district from furnishing accommodations.

nexus between the activity and an appropriate education for the child. We affirm MDE's determination that IDEA procedures apply to a complaint alleging a failure to include required accommodations in an IEP and conclude that such process is not precluded by section 504 of the Rehabilitation Act of 1973. We reverse MDE's determination that the district must provide special-education support for a PTO-sponsored event held off school grounds, outside the school day, not financed by the school district, and not supervised by school staff.

Affirmed in part and reversed in part.

Dated:

APPENDIX C

Complaint File #08-082C
July 15, 2008
Centennial ISD #012

Dear Superintendent and Complainant(s):

This letter is to inform you of the findings of the complaint entered by [Complainants] on behalf of [Student], a resident of Centennial ISD #012 (District). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. [Investigator] coordinated the investigation.

This investigation consisted of a review documents and education records submitted by both parties, interviews with the Student's mother and district staff, including an on-site interview of the principal and a meeting with District administrators and District counsel at the District office.

For organizational purposes, Issue #1 and #2 are combined.

ISSUE #1

The Complainants allege the District is violating standards pertaining to individualized education programs (IEPs). Specifically, the Complainants allege the District:

A. Failed to include in the Student's IEP a statement of the special education and related services to enable the Student to participate in extracurricular and other nonacademic activities, and

B. Failed to document the projected start date, anticipated frequency, location, and duration of extended school year (ESY) services, program modifications, and supports for school personnel.

ISSUE #2

The Complainants allege the District is violating standards pertaining to IEP team meetings. Specifically, the Complainants allege the District conducted meetings it billed as "Section 504" meetings on April 18 and May 16, 2008, and that only the Complainants, director of special education, and special education coordinator attended. The Complainants further specifically allege the Student's regular education teacher did not attend the most recent IEP team meeting and was not properly excused from attending.

Findings of Fact

1. The Student is an 11 year old learner with a disability enrolled in the District. She has been determined eligible for, and in need of, special education and related services by meeting state eligibility criteria in the area of autism spectrum disorder (ASD). She recently completed grade five. The Student's academic performance is measured using the Minnesota

Comprehensive Assessment II (MCA II) and the NWEA (a District-wide assessment).

2. The February 29, 2008 IEP, the current revision, was the result of a meeting held February 29, 2008 and a conciliation conference held March 21, 2008. The Complainants objected to the first proposed IEP from the IEP team meeting which was held March 1, 2008. Following the conciliation conference, a new revised proposed IEP was served on the Complainants on April 8, 2008. The Complainants did not object to this proposal. Rather, they marked a box on the notice labeled "I need further information" and retuned the Notice to the District dated April 18, 2008.

3. The current revision of the IEP includes the following statements of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel:

Special education, related service, supplement-ary aids and services, and program modifica-tions or supports for school personnel	Projected date for the beginning of the services and modifica-tions	Anticipated frequency of the services and modifica-tions	Location of the services and modifica-tions	Duration of the services and modifica-tions
Speech/Lan g-uage Impaired	3/15/2008	1 time/week	Special education	1 year
Developmen t-al Adapted Physical Education	3/15/2008	1 time/week	Special education	1 year
Developmen t-al Adapted Physical Education	3/15/2008	1 time/week	General education	Until end of school year
Autism Spectrum Disorder	3/15/2008	1 time/week	Special education	1 year
Specific Learning Disability	3/15/2008	5 times/ week	General education	1 year
Occupational Therapy	3/15/2008	3 times/ month	Special education	1 year
Occupational Therapy	3/15/2008	1 time/ month	General education	1 year
Assignments				

shortened by 50% unless Student requests to complete more				
Student will need only to answer the question/ problem.		If assignment requires rewriting question (not restating).		
Student given copies of notes and access to AT to assist in taking notes.		If extensive note taking is required.		
Student will be provided academic work completion progress report.		Weekly		
Student will receive homework assignment log by special education staff.		Weekly or daily		
Student will be given a backpack pass.				
Student will				

not participate in point programs (i.e. RAM points) or incentives.				
An extra set of academic books will be provided to the family.				For the academic year.
Extensive reading material may be available auditorily (CD).				
Special education support will be provided for written language tasks.			General education	
School based team and parent may agree to exempt Student from an assignment.				
Student will be given the option of an alternative platform to present				

speeches.				
Student may turn in late work without penalty.				
Student will have access to a multiplication table for math assignments.				
Student may receive the pass/fail grading option.			Music, band, and/or choir.	
Additional processing time in response to teacher questions.		Whenever teacher calls on her.		
Do not call on Student to read aloud.		Unless she volunteers		
Student to be provided a lock that is easier to manipulate than the turn-style locks.				
Option to not participate in group				

performance.				
Peer education.		One time per year with parent approval		
Access to a quiet work area. May listen to IPod in resource room.			Classroom or resource room	
Advanced notice of events.		Whenever there will be a seating change, or scheduled fire drill, lock-down, and tornado drill.		
Proactive Behavior Management Plan made available to all teachers including specialists.				
Accessible seating allowing for movement (back of classroom).		If necessary.		
Special education staff support available to				

assist with morning and afternoon organization.				
Accommodations for writing.		As recommended by the Occupational Therapist.		
Word processor, voice recognition, word prediction programs, and tape/CD recorder.		All writing projects as Student shows skill and interest and for tasks involving reading.		
Sensory objects including fidgets and oral stimulation.			At Student's seat.	
Behavior processing discussions.			Away from peers.	
Social stories regarding major changes and field trips.				
Access to scribe or computer.		Extensive writing activities.		
Unlimited time on		Whenever there is a		

timed tests.		timed test.		
Student may be given option to verbally state response to a scribe on some written work.				
Student may take a break or exit the classroom to go to a safe environment such as the motor room or resource room.		When Student tics.		
Health Plan with detailed instructions is available for both fainting episodes and tics. The health plan also details instructional strategies.				
Teacher or assistant will assist Student with direct support in getting	First week of school			First week of school

started on writing projects by helping with the setup of her laptop and giving brief instruction regarding how work should be transferred to her laptop.				
Team will convene to look at pattern of tardies and accom-modate accordingly, including condensing trips to locker bay, alternate passing times, or scheduled drink and/or bathrooms breaks.		If it is determined by the school and parent that Student is tardy to class because of her disability.		
Student will be given choice to complete work during work period, study hall, or		When Student exhibits passive work refusal.		

at home. Critical work will be sent home.				
Student's disability must be taken into account when she breaks a school rule and consequences are considered.		Incidents/ infractions of discipline policy.		
IEP to be provided to staff.				
Case manager will meet regularly with general education staff to discuss Student's needs, progress, and accommodations.				
Social skills support for staff. (ESY)		Once per week		
Social skills support. (ESY)		Once per week		
Written		Once.		During

language support. (ESY)				the IEP team agreed upon summer activity.

4. On February 7, 2008, prior to the IEP team meeting of February 29, the Complainants sent an email to the school psychologist listing accommodations they had brainstormed for the IEP revision for 2008-09. The list included:

> Accommodations for Extracurricular participation:
> [Student] will be allowed to miss practices and games as needed to manage health concerns and stress.
> [Student] will be provided with adult supervision from the end of the school day until adult pick up or the activity bus is rode home. The adult will make sure she has necessary materials with her, such as back pack and instrument.
> [Student] will have access to her cell phone after school and be allowed to use it to call parents.

5. The Complainants allege the District refused to discuss supplementary aids and services during extracurricular and nonacademic services at the IEP team meeting on February 29, 2008, and at the subsequent conciliation conference on March 21, 2008. Specifically, the Complainants allege the special education coordinator told the IEP team on February 29 "that extracurricular

activities are not discussed at the IEP meetings, but would be addressed via a 504 plan." The coordinator states that it was discussed at the meeting "whether and to what extent supplemental aids and services were necessary to provide [Student] an equal opportunity to participate in extracurricular activities and nonacademic services." According to the coordinator, the IEP team determined "that [Student] did not require supplementary aids and supports in order to participate in or have an equal opportunity to benefit from extracurricular activities and that she did not need to participate in extracurricular activities in order to receive FAPE." The coordinator further states that during the meeting, the Complainants "asked if the District would agree to hold a Section 504 meeting to consider a Section 504 Plan addressing accommodations for extracurricular activities." The District has repeatedly stated, however, that an IEP is not used to address supplementary aids and services for participation in extracurricular and nonacademic activities when those "activities were not necessary to provide a Free and Appropriate Public Education (F.A.P.E.)." The District Resource Manual for special education, given to all special education teachers in the District, states that:

> ...[e]ach IEP must include a statement of the. . .supplementary aids and services to be provided to the child, or on behalf of the child, . . . for the child to:
> - advance appropriately toward attaining the annual goals;

- be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and
- be educated and participate with other children with disabilities and nondisabled children in extracurricular and other nonacademic activities.

6. In a March 4, 2008 email from one of the Complainants to several district staff, including the coordinator, referring to a news report "about a janitor at the middle school" who allegedly sent sexually explicit text messages to a minor, the Complainant states:

> This sort of thing is one reason we would like supervision at clubs until pickup written into [Student's] IEP.

The District provided a copy of a letter dated March 4, 2008, written by the Complainants in which the Complainants object to the proposed IEP. They state in the letter that they need more information about "extracurricular/ non-academic accommodations[.]" The prior written notice which accompanied the proposed IEP did not indicate that supplementary aids and services to enable the Student to participate in extracurricular or nonacademic services were addressed or refused. An email dated April 4, 2008, from one of the Complainants to the coordinator states:

> I am attaching two documents that I have read (in addition to IDEA and Minn. Stat.)

> that lead me to believe the IEP is required to consider extracurricular activities for equal participation as well as FAPE. . . One is a funding bulletin with relevant questions on p. 6. The other is a recent complaint decision in the area of extracurricular activity. [Complainant] had a conversation with [MDE staff] at Mn Dept. of Ed. To get her perspective. She reiterated our understanding that no child should be on both an IEP and 504.

Based on these facts, it was District staff who determined the IEP would not address supplementary aids and services for extracurricular activities.

7. The Complainants and the coordinator agree that the general education teacher left the February 29, 2008 IEP team meeting "after the meeting was about half over." The Complainants and the District did not agree to this teacher leaving the meeting in writing.

8. The District has initiated a community education program and provides for the general supervision of the program. Centennial Community Services (CCS) offers educational opportunities for District residents of all ages including: educational; recreational; social; and cultural programs. These programs consist of: enrichment classes; outings; drivers education; swimming lessons, and more. Most classes and services are held in District facilities and throughout the entire school year. The director

of community services reports directly to the District superintendent.

9. On April 18, 2008, the Complainants met with the middle school activities director and the special education coordinator. The purpose of the meeting was to discuss the Student's participation in the Centennial Middle School Activities Program activities. The Activities Program is operated by CSS. The activities the parents wanted to explore for the Student included after-school clubs and volleyball, both of which are listed in the April 2008 brochure which is given to all 4th graders by the school and is titled "Centennial Middle School Activities Department 5th Grade Orientation".[1] CCS is part of the District. The District has stated the meeting "was to determine eligibility for 504 accommodations in this specific activity occurring in the fall of 2008." The District believes that accommodations under Section 504 of the Rehabilitation Act of 1973 are the way to ensure students have access to activities that are outside of the school day and are run by CCS. The District views CCS as a separate agency. A draft 505 plan was subsequently created by the Coordinator, although not shared with the parents. The draft 504 plan includes the following proposed accommodations:

- Repeated modeling of skill to be learned;
- Game rules/expectations would be presented visually;

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[1] Attached as Appendix A.

- The first week of an activity [Student] would be reminded to go to the after-school activity by school staff;
- If [Student] appeared upset after practice the coach would escort her to the lunchroom;
- Health Plan and Proactive Behavior Plan available to the coach and lunchroom supervision staff.

10. On May 16, 2008, another meeting was held with the special education coordinator and the Section 504 coordinator. The purpose of the meeting was to discuss whether accommodations would be provided for the Student to attend the fifth grade graduation party to be held on Saturday, May 17 at the local YMCA. All of the elementary school's fifth graders were invited to the party. The party was hosted by the Blue Heron PTO (PTO). According to the District, this was "a private graduation party for 5th grade Blue Heron students partially funded by the [PTO], ..." The District holds it is not responsible for accommodations for students with disabilities at PTO events like the fifth grade graduation party, held off-site and outside the normal school day because the PTO "does not receive any funds or benefits (i.e., copying, materials) from the district and is considered a private organization wholly funded by donations and fund raisers." Parents were not required to attend the party, and the permission form sent to Complainants included a space to inform the PTO whom the student could leave the YMCA with. This was the most

recent meeting prior to the filing of the complaint.

11. The PTO is an organization:

> ...to aid the students of Blue Heron Elementary School by providing support for their educational and recreational needs that are not otherwise provided for in the school corporation budgets and to promote open communication between administration, teachers, and parents.

The policies of the PTO are:

> A. This organization shall neither seek to direct the administrative activities of the school nor to control its policies.
>
> B. The organization may make suggestions to the administration concerning activities of the school, if such suggestion is made toward the betterment of conditions for all concerned. (i.e., students, teachers, administrators and parents.)

Membership in the PTO is open to:

> ...[a]ll parents and/or legal guardians of students who currently attend Blue Heron Elementary School and all current faculty and staff of Blue Heron Elementary School. . . . [Furthermore,] [t]he Principal shall be considered as a sitting advisor and/or consultant.

The PTO has a page on the school website, and it lists the officers and the principal and their phone numbers. According to the Centennial Schools Elementary Handbook:

> Parent organizations play an active role in your child's education. Call an organization board member if you are interested in becoming a member. Parent groups are non-profit organizations and contributions, including membership fees, may be treated as charitable gifts when itemizing expenses for federal income taxes. Organizations meet monthly. All parents/guardians are invited to attend. Information on the parent group is listed regularly in the school newsletter.

Also:

> Each elementary parent group conducts its own fundraising which helps support building activities, such as artist-in-residence programs, lyceums, guest speakers, sibling care, bussing for special events, purchase of books and other supplies, etc.

The PTO contributed the following to the school during the 2007-08 school year with some of the $49,888 it raised:

- 8 ½ SMART boards
- Blue Heron school calendars
- 5th grade party
- High Flying Heron Lunches
- School Safety Patrol

- Moonlight Bowling and Scooter City
- Special Education Field Trips
- Chess Club
- Student Council
- Laminating supplies

12. The District prioritizes organizations that use its facilities into three categories: A, B, and C. The groups are defined as follows:

A-1	School activities (including co-curricular and extra-curricular)
A-2	Centennial Community Services
A-3	Tax-supported public agencies operating within the district (would include public hearings, caucuses, elections, etc.)
A-4	City-sponsored recreation
B-1	School district community groups – non-profit
C-1	School district community groups – fundraising
C-2	Non-school district groups
C-3	Other

Community Services staff, who administer the use of facilities in the District, state that all parent teacher groups, including the Blue Heron PTO, are treated as A organizations for school activities. There is no charge to group A organizations that use the District facilities, except for a $15.00 per hour charge when staff must be brought in when the school is not open (e.g., on weekends). B and C groups are charged various amounts for using the District facilities, pursuant to an Hourly Fee Facility Use Schedule. (E.g., group B organizations are

charged $13 per hour to use the cafeteria while a group C organizations are charged $39 per hour.)

Conclusions

1. Federal regulation at 34 C.F.R. § 300.320, Definition of individualized education program, states:

> (a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include--
>
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child--
>
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
>
> . . .

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

2. Federal regulation at 34 C.F.R. § 300.321, IEP Team, states:

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes-

(1) The parents of the child;

(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

(4) A representative of the public agency who

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgable about the general education curriculum; and

(iii) Is knowledgable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

(6) At the descretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

. . .

(e) IEP Team attendance.

(1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--

(i) The parent, in writing, and the public agency consent to the excusal; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

3. The general education teacher left the February 29, 2008, IEP team meeting without the written agreement of the Parents and District as required by 34 C.F.R. § 300.321(e).

4. Federal regulation at 34 C.F.R. § 300.42, Supplementary aids and services, states:

> Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extra-curricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.

5. Federal regulation at 34 C.F.R. § 300.107, Nonacademic services, states:

> The State must ensure the following:
>
> (a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
>
> (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and

assistance in making outside employment available.

6. Federal regulation at 34 C.F.R. § 104.4, Discrimination prohibited, states:

> (a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.
>
> (b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
>
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

7. The activities discussed at the April 18 meeting were nonacademic or extracurricular activities which should have been addressed in the Student's IEP. At the April 18 meeting, the parties discussed after-school activities for the fall of 2008, including clubs and athletic activities provided to students at Centennial Middle School through the Centennial Middle School Activities Department. All of the activities offered by the District through the Centennial Middle School Activities Department are sponsored by the District. They include "athletics" and "recreational activities" and so are nonacademic services pursuant to 34 C.F.R. § 300.107. That the activities occur outside of the school day or are run by CCS (a District program) does not exempt them from 34 C.F.R. § 300.107. In fact, this regulation specifically requires equal opportunity for

participation in these types of activities. Thus, the clubs and volleyball activities the Complainants sought to ensure were accessible to their child are extracurricular activities which the IEP was required to ensure access to. The supplementary aids and services, if documented in the IEP, would be eligible for Part B funding because they would have been determined necessary by the IEP team to enable the Student to participate in the activities. It is important to note that the District did not ultimately determine the supplementary aids and services the Complainants requested for the after-school activities were not necessary. To the contrary, while the District did not agree to the requested supplementary aids and services, it did propose a different set of supplementary aids and services under a draft 504 plan. The District did refuse to have a properly constituted IEP team address the question and document any such determination in the IEP, along with the due process procedures that are required therewith.

8. When a child with a disability requires supplementary aids and services in order to participate in or benefit from extracurricular or other nonacademic activities, the IEP team must document those supplementary aids and services in the IEP. The use of a Section 504 plan in the case of a child with a disability deprives the parents the specific due process rights provided by the IDEA, such as: the right to a team meeting with the regular and special education teachers and a qualified representative of the District; written notice of

proposals and refusals; documentation in the IEP; and the dispute resolution measures of conciliation, resolution sessions, and a due process hearing before a knowledgeable and impartial hearing officer. 34 C.F.R. §§ 300.17, 300.320, 300.321, 300.501, 300.503, 300.511, and Minn. R. 3525.3700. Thus, the District was required to hold IEP team meetings to discuss the Complainants' requests for accommodations for extracurricular and nonacademic activities. The failure to do so, in this case, results in violation of 34 C.F.R. § 300.321 because the District did not hold IEP team meetings that included regular and special education teachers to discuss supplementary aids and services to enable the Student to participate in extracurricular and other nonacademic activities. The District also failed to provide the Parents with written notice concerning supplementary aids and services for participation in extracurricular and nonacademic activities pursuant to 34 C.F.R. § 300.503 and Minn. R. 3525.3600.

9. The District's position that the PTO is a private organization for which it has no responsibility for is not supported by the facts or law. The United States Department of Education's Office for Civil Rights (OCR) has stated that:

> District's obligation to provide interpreter (or alternative) services is not limited to 'mandatory' activities. Parents are a primary beneficiary of many 'voluntary' programs and activities, such as parent-teacher conferences, IEP meetings, and PTA

> meetings, graduation ceremonies, speaker series, and school board meetings. Nonetheless, the District is required to provide appropriate aids and services to disabled parents to ensure effective access to such programs.

Mt. Diablo Unified School District, 44 IDELR 261, ___ (OCR, April 28, 2005).

While this case concerns benefits for a student rather than a parent, the analysis OCR used in Mt. Diablo is applicable. That is, even though the activity is not mandatory for the student, the district still has an obligation to provide access to the activity pursuant to 34 C.F.R. § 104.4. Furthermore, OCR specifically includes PTA meetings in its list of benefits. While this fact does not itself mean the PTO in this case is sufficiently removed from the District to release the District from a responsibility for nondiscrimination, it illustrates a recognition that such affiliated organizations may be treated as extensions of a school district for purposes of nondiscrimination law and thus IDEA.

10. In this case, the PTO is a special interest group or club sponsored by the public agency. But for the existence of Blue Heron Elementary School, there would be no Blue Heron PTO. The District does provide "benefits" to the PTO because it treats the PTO as a "school group" in terms of priority and charging for use of the District facilities, rather than a non-profit or fundraising school community group. The school

advertises for the PTO in its handbook and provides a page for the PTO on its website. Only parents and guardians and staff from Blue Heron Elementary may be members of the PTO. The school principal is an advisor to the PTO and gives direction to the PTO. The PTO raises funds exclusively for the school and the benefit of its students. The PTO funds are used to contribute resources, materials, and events, such as field trips and parties, to the school. The relationship between the two organizations is so intertwined that the District cannot separate its obligations under IDEA to ensure access to nonacademic activities from the activities the PTO provides for students at the school.

11. The fifth grade graduation party, held off school grounds on a Saturday and put on by the PTO was a nonacademic or extracurricular activity. The District states the party was "a private graduation party for fifth grade Blue Heron students partially funded by the [PTO], ..." Nonacademic and extracurricular activities include "recreational activities" and "special interest groups or clubs sponsored by the public agency[.]" 34 C.F.R. § 300.107(b). The list in the federal regulations is not exclusive. The District refused to convene the IEP team to address the Student's need for supplementary aids and services to permit the Student to participate in the recreational activity in violation of 34 C.F.R. § 300.321.

12. The District failed to document in the IEP the projected date for the beginning of the services

and modifications listed, the anticipated frequency, location, or duration of the services and modifications as listed in the following chart:

(X means element not documented)

Special education, related service, supplement-ary aids and services, and program modifica-tions or supports for school personnel	Projected date for the beginning of the services and modifica-tions	Anticipated frequency of the services and modifica-tions	Location of the services and modifica-tions	Duration of the services and modifica-tions
Speech/Lang u-age Impaired	3/15/2008	1 time/week	Special education	1 year
Developmental Adapted Physical Education	3/15/2008	1 time/week	Special education	1 year
Developmental Adapted Physical Education	3/15/2008	1 time/week	General education	Until end of school year
Autism Spectrum Disorder	3/15/2008	1 time/week	Special education	1 year
Specific Learning Disability	3/15/2008	5 times/ week	General education	1 year

Occupational Therapy	3/15/2008	3 times/ month	Special education	1 year
Occupational Therapy	3/15/2008	1 time/ month	General education	1 year
Assignments shortened by 50% unless Student requests to complete more	X	X	X	X
Student will need only to answer the question/ problem.	X	If assignment requires rewriting question (not restating).	X	X
Student given copies of notes and access to AT to assist in taking notes.	X	If extensive note taking is required.	X	X
Student will be provided academic work completion progress report.	X	Weekly	X	X
Student will receive homework assignment log by special education staff.	X	Weekly or daily	X	X

Student will be given a backpack pass.	X	X	X	X
Student will not participate in point programs (i.e. RAM points) or incentives.	X	X	X	X
An extra set of academic books will be provided to the family.	X	X	X	For the academic year.
Extensive reading material may be available auditorily (CD).	X	X	X	X
Special education support will be provided for written language tasks.	X	X	General education	X
School based team and parent may agree to exempt Student from an assignment.	X	X	X	X
Student will	X	X	X	X

be given the option of an alternative platform to present speeches.				
Student may turn in late work without penalty.	X	X	X	X
Student will have access to a multi-plication table for math assignments.	X	X	X	X
Student may receive the pass/fail grading option.	X	X	Music, band, and/or choir.	X
Additional processing time in response to teacher questions.	X	Whenever teacher calls on her.	X	X
Do not call on Student to read aloud.	X	Unless she volunteers	X	X
Student to be provided a lock that is easier to manipulate than the turn-style locks.	X	X	X	X
Option to not	X	X	X	X

participate in group performance.				
Peer education.	X	One time per year with parent approval	X	X
Access to a quiet work area. May listen to IPod in resource room.	X	X	Classroom or resource room	X
Advanced notice of events.	X	Whenever there will be a seating change, or scheduled fire drill, lock-down, and tornado drill.	X	X
Proactive Behavior Management Plan made available to all teachers including specialists.	X	X	X	X
Accessible seating allowing for movement (back of classroom).	X	If necessary.	X	X
Special education	X	X	X	X

staff support available to assist with morning and afternoon organization.				
Accommodations for writing.	X	As recommended by the Occupational Therapist.	X	X
Word processor, voice recognition, word prediction programs, and tape/CD recorder.	X	All writing projects as Student shows skill and interest and for tasks involving reading.	X	X
Sensory objects including fidgets and oral stimulation.	X	X	At Student's seat.	X
Behavior processing discussions.	X	X	Away from peers.	X
Social stories regarding major changes and field trips.	X	X	X	X
Access to scribe or computer.	X	Extensive writing activities.	X	X

Unlimited time on timed tests.	X	Whenever there is a timed test.	X .	X
Student may be given option to verbally state response to a scribe on some written work.	X	X	X	X
Student may take a break or exit the classroom to go to a safe environment such as the motor room or resource room.	X	When Student tics.	X	X
Health Plan with detailed instructions is available for both fainting episodes and tics. The health plan also details instructional strategies.	X	X	X	X
Teacher or assistant will assist Student with direct support in getting started on	First week of school	X	X	First week of school

writing projects by helping with the setup of her laptop and giving brief instruction regarding how work should be transferred to her laptop.				
Team will convene to look at pattern of tardies and accom-modate accordingly, including condensing trips to locker bay, alternate passing times, or scheduled drink and/or bathrooms breaks.	X	If it is determined by the school and parent that Student is tardy to class because of her disability.	X	X
Student will be given choice to complete work during work period, study hall, or at home. Critical work will be sent home.	X	When Student exhibits passive work refusal.	X	X

Student's disability must be taken into account when she breaks a school rule and consequences are considered.	X	Incidents/ infractions of discipline policy.	X	X
IEP to be provided to staff.	X	X	X	X
Case manager will meet regularly with general education staff to discuss Student's needs, progress, and accommodations.	X	X	X	X
Social skills support for staff. (ESY)	X	Once per week	X	X
Social skills support. (ESY)	X	Once per week	X	X
Written language support. (ESY)	X	Once.	X	During the IEP team agreed upon summer activity.

13. The District violated 34 C.F.R. § 300.320 when it failed to adequately document the projected start date, anticipated frequency, location, and duration of all of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel necessary to enable the Student to advance appropriately toward attaining her annual goals, to be involved in and make progress in the general curriculum, and to particiapte in extracurricular and other nonacademic activities.

Decision

The District violated 34 C.F.R. § 300.320 when it failed to adequately document the projected start date, anticipated frequency, location, and duration of all of the special education and related services and supplementary aids and services, including ESY, and program modifications or supports for school personnel necessary to enable the Student to advance appropriately toward attaining her annual goals, to be involved in and make progress in the general curriculum, and to particiapte in extracurricular and other nonacademic activities, including District run after-school activities and the end of the year party hosted by the school PTO.

The District violated 34 C.F.R. § 300.321 when it permitted the general education teacher to leave the IEP team meeting without the written agreement of the Parent, and when if failed to include the required team members at subsequent meetings to discuss supplementary aids and services that should have been considered for inclusion in the IEP to enable the

Student to participate in extracurricular and nonacademic services.

The District violated 34 C.F.R. § 300.503 and Minn. R. 3525.3600 when it failed to provide prior written notice concerning its consideration or refusal of the Parents' request for supplementary aids and services for extracurricular and nonacademic activities as part of the IEP.

Corrective Action

1. The District must, by July 31, 2008, convene the Student's IEP team, with at least the minimally required team members, to discuss the supplementary aids and services the Student may need in the extracurricular and other nonacademic activities the Complainants have selected for her for the fall of 2008. Any such services must be properly documented in the IEP, including a statement of the needed service and the projected date for the beginning of the services, and the anticipated frequency, location, and duration of those services.

2. The IEP must also be revised to include the projected date for the beginning of the services and modifications required in the IEP, and the anticipated frequency, location, and duration of those services and modifications.

3. District special education staff and parents must be informed of the District policy and legal requirements that when a child has an individualized education program, the IEP team must document the supplementary aids and

services to enable the child to participate in extracurricular and other nonacademic activities, and that a separate Section 504 plan should not be created to address IEP content. This update, and the method by which it will be disseminated to staff and parents, must be provided to the Corrective Action Specialist by August 15, 2008, for approval.

4. District staff and parents must be informed of the legal requirement that required IEP team members may only be excused from attending all or part of an IEP team meeting if agreed to in writing pursuant to 34 C.F.R. § 300.321(e). This update, and the method by which it will be disseminated to staff and parents, must be provided to the MDE's corrective action specialist by August 15, 2008, for approval.

ISSUE #3

The Complainants allege the District violated standards pertaining to data privacy and consent. Specifically, the Complainants allege the principal of the Student's school disclosed personally identifiable information about the Student to other [individuals] prior to an [event].

Findings of Fact

1. The District denies that the principal disclosed, at any time, personally identifiable information about the Student to other parents.

2. On [date], the principal received an email from the Complainants requesting accommodations

for their child at the [event] organized by the PTO. The principal responded the same day, via email, that no accommodations would be provided. According to that email message:

> [t]he [event] is not an extension of the school day. It is a PTO sponsored event that takes place outside of the normal school day. It is a voluntary event that students may participate in but is not necessary. So, we will not be providing Special Education support for [Student] during this event [ ].

3. During a meeting with school staff on [date], the Complainants were again advised that the District would not provide accommodations for the Student at the [event].

4. The Complainants contacted [individual] to discuss accommodations for the Student at the [event]. They also contacted [another individual] and requested an accommodation for the Student at the [event]. The Complainants advised the [individual about the Student's condition]. The accommodation sought was "a designated individual aware of [Student's] health, safety, and behavioral needs" and to let the Student know who that person is. The individual was to "frequently check on [Student's] presence and activities – perhaps every 10 minutes or so."

5. At least one [individual] contacted [district staff] regarding the Complainants' request. The [staff person] contacted the principal [. . .] advising him of the Complainants' request for

accommodation to the PTO. [An individual] had also left a message for the principal regarding the same issue. The principal listened to these messages, and then called the director of special education. The determination was then made to call the Complainants to advise them not to request accommodations from the PTO. This call was made by the principal and the direction was conveyed. During this phone call, one of the Complainants raised the issue of a possible release of private data by the principal. The principal had not talked to any parents about any of the issues at hand, at that point, except to provide a phone number to an [individual].

6. The principal then called one of the [individuals] who had concerns about the Complainants' request for accommodations. The principal, without identifying any parties, advised the [individual] that the PTO was not required to provide accommodations to any student other than the supervision they would provide to the group of students in general. The [individual] confirms this.

Conclusions

1. Federal regulation at 34 C.F.R. § 300.622, Consent, states:

> (a) Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education

records, and the disclosure is authorized without parental consent under 34 CFR part 99.

2. Federal regulation at 34 C.F.R. § 300.623, Safeguards, state:

> (a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

3. "FERPA does not protect information which might appear in school records but would also be 'known by members of the school community through conversation and personal contact. Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records.'" Daniel S. v. Bd. of Educ. of York Comm. High Sch., 152 F.Supp. 2d 949, 954 (N. D. Ill. 2001), *citing* Frasca v. Andrews, 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979).

4. There is no evidence the principal disclosed personally identifiable about the Student or [Student's] parents to other parties without consent. The evidence shows that the Complainants had independently made contact with other [individuals] about their concerns for accommodations for the Student at the [event], making Student, [and] condition, and the requested accommodations known to other parents. These [individuals] sought advice from the principal on what to do. The principal

> provided general answers and did not discuss any information with the [individuals] beyond what was already made known to them by the Complainants.

Decision

The District is not in violation of 34 C.F.R. §§ 300.622 or 300.623.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §§ 300.151-153. Questions about this decision should be directed to the [complaint investigator]. If the Complainant has subsequent concerns about the District's implementation of the corrective action, he/she should contact [due process specialist].

Sincerely,

Amy L. Roberts, J.D.
Director
Division of Compliance and Assistance

APPENDIX D

Minnesota Department of Education

September 12, 2008

Dave Thacker
Centennial ISD # 012
4707 North Road
Circle Pines, MN 55014

Re: Complaint File # 08-082C;
Your letter of September 5, 2008.

Dear Mr. Thacker.

Thank you for your letter of September 5, 2008, describing your questions with regard to the corrective action for Complaint File # 08-082C. You specifically requested assistance with Corrective Action # 3 from the Order of July 15, 2008. For reference, Corrective Action #3 is stated here:

3. District special education staff and parents must be informed of the District policy and legal requirements that when a child has an individualized education program, the IEP team must document the supplementary aids and services to enable the child to participate in extracurricular and other nonacademic

activities, and that a separate Section 504 plan should not be created to address IEP content. This update, and the method by which it will be disseminated to staff and parents, must be provided to the Corrective Action Specialist by August 15, 2008, for approval.

Responses to your questions:

1. "First, we are asking you to provide us with the names of three or four school districts that have a policy meeting MDE guidelines."

   MDE does not have "guidelines" concerning special education due process. The corrective action order in MDE # 08-082C is based on federal law. The District's policies must be based, as stated in the Order, on the law. MDE does not keep records of current district policies.

   You specifically ask, "Where such information is included in the IEP[?]" Your staff have demonstrated they know where to document supplementary aids and services. This is based on the IEP reviewed as part of this complaint. The problem appears to be one of consistency; whether to use an IEP or 504 plan. A written policy based on 34 C.F.R. § 300.320, and explained to staff, should remedy this problem.

   MDE, in the Order of July 15, 2008, left it to the District's discretion as to how to notify parents of these legal requirements because the District knows best how to communicate effectively with the families it serves. The District's policies must,

at a minimum, be consistent with IDEA and related state law.

You ask, "what activities require supports and services[?]" Please see 34 C.F.R. § 300.107 to determine what activities may require supports and services.

2. Extracurricular activities need not be documented in the IEP unless the IEP team determines a particular activity or activities are necessary to provide a free appropriate public education to a child. When a child with a disability participates in an extracurricular activity, the IEP need only document how, as necessary, that activity will be made accessible to the child, consistent with 34 C.F.R. §§ 300.42 and 300.107. It is not for the team to determine whether a child can participate in a particular activity, only how to make the activity accessible. If the team requires additional expertise to make such determinations, it is required to bring in people who can assist, in accordance with 34 C.F.R. § 300.321(a)(6).

3. Concerning your questions on financing, the expenditures for supports for the extracurricular activities would be eligible for federal special education (Part B) revenue. The person who is directing extracurricular and non-academic activities should document their expenditures.

4. To clarify, the role of the IEP team is to determine the contents of the IEP, consistent with 34 C.F.R. § 300.324. District determinations limiting student access to extracurricular and nonacademic activities would have to be considered in light of

the requirement for access set forth in IDEA as well as other federal laws. If the District believed a student with a disability could not be accommodated to participate in a particular extracurricular activity, it would be prudent to consult district counsel before starting that position to the parent or student.

It is not the role of the IEP team to determine whether the parent's or student's choice of extracurricular activities is appropriate for the student. Nor are the extracurricular and nonacademic activities a student participates in typically documented in the IEP. Rather, the supplementary aids and services necessary to permit the student to access the activities are documented.

Any activity for which a fee is normally charged to participate in also would be charged to a student with a disability. Fees cannot be charged for the supplementary aids and services. Fees cannot be charged for an activity the IEP team determined is necessary to provide a free appropriate public education. The parent must be given the same opportunity to participate in activities as parents of non-disabled children. A parent of a child with a disability cannot be required to attend activities unless the parents of non-disabled children are required to attend with their children.

5. In regard to your questions regarding students placed in programs at The Pines, we need more detail to provide an accurate response. If you have due process questions concerning particular children at The Pines, please submit those

separately with sufficiently detailed information about placement, programming, and residency.

We hope the technical assistance we have provided via telephone conversations and this letter resolves your questions concerning the corrective action required from Complaint File # 08-082C. If you still require a meeting to further discuss this matter, please let us know.

Sincerely,

/s/ Jim Mortenson
Jim Mortenson
Due Process Specialist
Division of Compliance and Assistance

/s/ Brenda Tantow
Brenda Tantow
Due Process Specialist
Division of Compliance and Assistance

JM:BT:JP

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